85-892

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLES W. OHLE
and
RONALD J. JACKSON,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

1. Whether indictments under legislation concededly effective after the alleged commission of alleged violations charged and increasing former penalties therefor; changing the nature thereof from Misdemeanor to Felony, and depriving those charged, of a defense in connection therewith deprives those involved of constitutional safeguards against ex post facto punishment and due process protections.

2. Whether indictments under legislation concededly effective after the alleged commission of alleged violations charged and increasing former penalties therefor; changing the nature thereof from Misdemeanor to Felony, and depriving those charged, of a defense in connection therewith deprives those involved of constitutional safeguards against ex post facto punishment and due process protections, the more particularly when legislation of the forum expressly forbids such prosecution.

3. Whether indictments charging an offense which partially occurred before the effective date of the legislation creating same, and where state legislation expressly provides for prosecution therefor under prior legislation providing different and lesser penalties therefor deprives those charged of due process of law and protections against ex post facto punishment.

4. Whether in a disputed factual situation as to whether an element of an alleged offense occurred before or after the effective date of legislation under which the subjects were indicted, the court erred irreparably in not submitting the question to the jury under guiding instructions for its resolution as the finder of facts, the more particularly since ex post facto punishment and constitutional due process of law depended thereon.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of the parties to the proceeding in this Court.

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TABLE OF SUPPORTING AUTHORITIES

Cases:

Burello v. Commonwealth, State Emp. Retirement 411A 2d 852

Calder v. Bull, 3 U.S. (3 Dall.) 386

Chalin v. State, 1982 *Tex*, 6458 W 2d

Dobert v. Florida, 432 U.S. 282

Hayward v. U.S. Parole Commission, 502, F. Supp. 1007

Iowa v. Quanrude, 222 N.W. 2d, 467, 1974

Lindsey v. Washington, 301. U.S., 397, 1937

Massarella v. Elrod, 682 F. 2d 688

People v. Fox, 1984, 471 NYS 642

People v. Massarella, 1979, 400 NE 2d 436

State v. Bunn, 1968, 440 P 2d, 528

State v. Theodosopoulous, 461 A. 2d 100

State v. TPM, 1983, 460 A. 2d, 167

State v. Quanrude (Iowa) 222 N.W. 2d, 467

Thompson v. Utah, 1898 170 U.S. 343

U.S. v. Brown, 555 F. 2d 407

U.S. v. Pro Football, Inc., 514 F. 2d, 1396

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 9, Subsection 3 of the Constitution of the United States provides that "no bill of attainder or Ex Post Facto law shall be passed."

The 14th Amendment to the Constitution of the United States provides, among other things, that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny persons within its jurisdiction the equal protection of the law.

The Constitution of Pennsylvania, Article I, Section 17 provides that no "Ex Post Facto law or law impairing the obligations in contract" shall be passed, by the Pennsylvania General Assembly

STATUTORY PROVISIONS INVOLVED

The Crime Code of Pennsylvania 18 PS. 4701 defining the crimes of Bribery and Corrupt Influences and providing punishment therefor, available in Appendix H Page A 95.

The Penal Code of Pennsylvania 18 PS. Section 4303 defining Bribery of government officials and employees, judges, juries, etc. and providing punishment therefor reflected in Appendix H and available on Page A 96.

The Crime Code of Pennsylvania, 18 Pa. C.S. 3927 theft by failure to make required distribution of funds received, and the punishment therefor, available under Appendix E, Page A 61.

18 Pa. C.S. 903 charging conspiracy.

The Act of December 6, 1972, P.L. 1482, No. 334, effective June 6, 1983 and the second section thereof available under Appendix D, Page A 46.

IN THE

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October Term, 1984

CHARLES W. OHLE
and
RONALD J. JACKSON,

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v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner in his own right and on behalf of Co-Petitioner Ronald J. Jackson hereby Petitions for a Writ of Certiorari to review judgments of the Supreme Court of Pennsylvania more particularly set forth hereinafter and in support thereof avers the following:

OPINIONS BELOW

Chronologically arranged Opinions of the Court below are as follows:

a. Appendix F, Page A 76, Opinion and Order of the Court of Common Pleas of Dauphin County Pennsylvania of March 30, 1978

b. Appendix G, Page A 92, Supplemental Opinion of Dauphin County Court of Pennsylvania, Dated June 8, 1979

c. Appendix E, Page A 52, Opinion and Judgment of the Superior Court of Pennsylvania, Dated Sept. 25, 1981

d. Appendix D, Page A 31, Opinion and Judgment of the Supreme Court of Pennsylvania of Dec. 14, 1983.

e. Appendix C, Page A 26, Opinion and Judgment of the Superior Court of Pennsylvania of March 8, 1985

STATEMENT OF JURISDICTION

Petitioners seek review of the per curiam denial on the part of the Supreme Court of Pennsylvania of the petitioners application for allowance of appeal from the judgment entered on March 8, 1985 in the Superior Court of Pennsylvania, and more particularly from the judgment of the Supreme Court of Pennsylvania of December 14, 1983 reversing the action of the Superior Court of Pennsylvania in quashing indictments for Bribery and Conspiracy filed against the petitioners and the remanding of all other indictments against the petitioners to the Common Pleas Court of Dauphin County for a new trial and they invoke 28 USC Section 1254(1) as jurisdiction, for the Court to so do.
(See Appendixes A, Page A-1, and D, Page A-31 respectively)

STATEMENT OF THE CASE

During the year 1972 Reserve Insurance Co. of Chicago, IL a wholly owned subsidiary of American Reserve

Insurance Co. maintained a policy of insurance on approximately 28,000 motor vehicles of the Commonwealth of Pennsylvania and utilized the services of Market Facilities Insurance of New York also a wholly owned facility of American Reserve Insurance in discharging some of the responsibilities provided in the insurance coverage. The policy covered a three-year period and was renegotiated annually largely, but not exclusively for computing the annual overall charges to the Commonwealth for the services to be rendered in connection therewith, the said charges being determined measurably by the services which had been required in the previous year, or years.

In the year 1972 the local broker for said policy was apparently a supporter of one of the states major political parties. The other major party had come into statewide power and it was obviously time for a change in the brokerage allocation. The change was made more compelling by the frank profession of Frank C. Hilton, then Secretary of Property and Supplies for the Commonwealth that he was desirous of naming a broker who was a party member from whom they could make money. The achievement of this goal required time, and during approximately nine months of the fiscal year July 1972 to June 30, 1973, no broker was appointed, the duties of same being performed by Market Facilities Insurance Co. of New York, the aforementioned referred to subsidiary of American Reserve Insurance Co.

The said Secretary of Pennsylvania's Department of Property and Supplies turned over to Anthony J. Trucco, who headed the Bureau of Insurance in the said department, the recruiting of the proper organization to be the appointed broker. Trucco communicated with Noel T. Bernard, Resident Vice President of Market Facilities, Inc. of New York for guidance in procuring the proper broker. For some reason, which is not patently apparent

in the transcript testimony, both Market Facilities Insurance, Co. of New York and Reserve Insurance Co. of Chicago were also desirous of a change in brokers. Bernard recommended Charles W. Ohle, Inc. of New York city to be broker. In furtherance thereof Bernard arranged a meeting between Trucco, Ohle and himself at Stan's Restaurant in New York city in the early part of February, 1973. Bernard indicates that he left the table when the discussion came to the terms underwhich the brokerage appointment would be awarded to Charles W. Ohle, Inc. However, there is an abundance of testimony indicating his awareness of such terms. No mention of the interest of Secretary Hilton in this matter was made. Several days later Bernard was advised of the acceptance of Charles W. Ohle, Inc. of the terms which had been dictated to him as prerequisite to his being named broker for the aforementioned motor fleet policy.

The conditions for reveiving this brokerage were largely the following:

> The insuring company would pay Charles W. Ohle, Inc. a premium of 20% of the funds received from the state for coverage.
>
> The broker would pay thèrefrom to the Pennsylvania Higher Education Assistant Agency 7 percentum thereof.
>
> The broker would pay to Anthony J. Trucco 6 percentum thereof.

Charles W. Ohle, Inc. was not authorized to do business in Pennsylvania and to facilitate the foregoing Charles W. filed an application and procured authority to so operate in Pennsylvania on/or about during the month of March and was selected as broker in connection with the said policy during the month of April, 1973.

Apparently no insurmountable problems occurred in the first two years of the policy. However, in the third

year, to wit from July 1st, 1974 to June 30, 1975 problems did arise. Arrangements had been made which were agreeable to all concerned, that payment checks by the State for the services bargained for would be made to Market Facilities Insurance Co. New York and Charles W. Ohle, Inc. jointly and that Market Facilities, Inc. of New York would either endorse said check over to Charles W. Ohle, Inc. or that Charles W. Ohle acting individually would endorse said checks over to Charles W. Ohle, Inc. on behalf of said Market Facilities and that Charles W. Ohle, Inc. after depositing said checks in their own account would deduct its 20% premium therefrom and forward the balance to the insurer, the said Reserve Insurance Co. of Chicago. Payment was made accordingly until and inclusive of the first instlallment due for the fiscal year July 1, 1984 to June 30, 1985. (See T.T., Page 89, Line 29.) The second payment to the insurer was not made nor was any subsequent payment made thereafter, and the insurer notified the State of its intention to cancel the policy as of Jan. 27, 1985.

During the interim, the State had paid its obligations for the annual year as aforesaid by delivering checks to a representative of Charles W. Ohle, Inc. in Pennsylvania, on July 25, Aug. 5, and Sept. 26, 1974 in the respective sums of $500,000, $300,000 and $215,000 payable to Market Facilities Insurance Co. and Charles W. Ohle, Inc.

After inquiry by the insurer to Petitioner Ronald J. Jackson as to when payments would be made of the second installment a check was issued by Charles W. Ohle, Inc. to the insurer which was returned for insufficient funds. No further payments were made to the insurer by the Petitioners.

The matter appears to have become the subject of public inquiry through the leakage to a local newspaper of information by a disgruntled employee of the Ohle company reflecting knowledge on his part of a kick back scheme between the Secretary of Property and Supplies

and the Ohle company. Investigation followed by both Federal and State authorities and as a consequence thereof Petitioners were indicted by the Grand Jury of Dauphin County's Criminal Division, for Bribery and Corrupt influence, Conspiracy, and obtaining property upon agreement or subject to a known legal obligation to make specified payments or other disposition and of intentionally dealing with property as their own and of failing to make the required payments or disposition on June 11, 1975. Prior to trial preliminary motions were filed raising questions herein involved and again subsequent thereto motions for new trial and in arrest of judgment, all of which were denied by the Court.

The first trial of Petitioners began on June 1, 1977; in the Common Pleas of Dauphin County, Pennsylvania on the charge of obtaining property upon agreement and subject to a known legal obligation to make specifed payments or other disposition and that Petitioners did intentionally deal with said property as Petitioners own and failing to make the required payment or disposition. It resulted in a conviction of Petitioners.

A second trial on charges of Bribery and Conspiracy began on Nov. 15, 1977 in the same court and was recessed on/or about Nov. 17, 1977 because of the illness of Petitioner, Ronald J. Jackson and was recommenced on/or about Dec. 13, 1977 against Charles W. Ohle alone. It also resulted in a conviction of Charles W. Ohle. The said charges against Ronald J. Jackson have not been reactivated. On April 21, 1978 Petitioners herein were sentenced in the Dauphin County Court House in Harrisburg, Pennsylvania. (See Appendix O., Page 123 as follows)

On the charge of receiving property under agreement etc. and using it as his own and not disposing of it properly, Petitioner Ohle was fined, $1,000, cost of prosecution, and confinement in a State correctional institution for not less than three years and no more than seven years, together with restitution to the Commonwealth in

the amount of $304,500. In connection with the charge of Conspiracy, Petitioner Ohle was sentenced to pay a fine of $500, the cost of prosecution, and confinement in a State correctional institution of not less than one year and no more than two years and to begin after the expiration of the sentence imposed on the aforementioned misuse of funds charge. On the Bribery charge, Petitioner Ohle was sentenced to pay a fine of $500, the cost of prosecution and confinement in a State correctional institution for a term of not less than six months and no more than one year, the sentence to run concurrent with that imposed in the Conspiracy charge.

The Defendant Ronald J. Jackson was sentenced on the failure to make required distribution of funds received in connection with a known agreement, to pay a fine of $1,000 cost of prosecution and confinement in a State correctional institution of not less than three years and no more than seven years. In addition said Petitioner, Ronald J. Jackson was ordered to make restitution to the Commonwealth of Pennsylvania in the amount of $304,500.00.

An Appeal was processed by Petitioners from the foregoing to the Superior Court of the Commonwealth of Pennsylvania and on Sept. 25, 1981 its Opinion and Order was filed quashing the indictments in the Bribery and Conspiracy charges and remanding the charges on the misuse of funds indictments for a new trial.

The Commonwealth of Pennsylvania Appealed from the decision of the Superior Court of Pennsylvania to the Supreme Court of Pennsylvania and/or about Dec. 14, 1983 that Court filed its Opinion and Order which reinstated the judgment of the Dauphin County, Pennsylvania Common Pleas Court while remanding certain undisposed aspects of the situation to the Superior Court of the Commonwealth of Pennsylvania for their disposition.

In compliance with directions of the Supreme Court of Pennsylvania, the Superior Court of Pennsylvania, on

March 8, 1985 issued a Memorandum Opinion and Order which reinstated the judgment of the Dauphin County Common Pleas Court of Pennsylvania.

On April 8, 1985 Petitioners filed and Application for Allowance of an Appeal from said judgement of the Superior Court of Pennsylvania and by per curiam action the Supreme Court of Pennsylvania on Aug. 27, 1983 the application was denied.

Application was mades by Petitioners for and Extension of Time for the Filing of a Petition for Writ of Certiorari and on the 17th day of October 1985, the Honorable William J. Brennan, Jr. Associate Justice of this Honorable Court issued an Order "extending time to and including Nov. 25, 1985" for filing a petition for Writ of Certiorari which order bears the Processing No. A 302.

The constitutional concerns of the Petitioners, who are first offenders, were raised early in the proceedings, to wit in Pre Trial proceedings in the Forum Court. Reference thereto, Appendix F, Page A 79 and No. 5 of Page A 80. The Forum Court was again advised of Petitioners constitutional concerns in rejecting Petitioners post trial applications for a new trial and in arrest of judgement of June 13 and December 22, 1977 respectively. See Appendix M and N. respectively Pages A. 112 and A 116 with particular reference to Page 113 Paragraph 13 and Page 118 Paragraph 16. The matter was raised anew in the Superior Court of Pennsylvania reference thereon being made in Appendix E. Page A. 57 and was also renewed in the Supreme Court of Pennsylvania, Appendix D., Page A 36.

In the Bribery and Conspiracy cases 18 Pa S 4701 and 18 PA S 903 the Trial Court concedes that the offenses involved occurred before June 6, 1973 effective date of the Crime Code but down graded the failure to indict under the former Penal Code indicating that the language of both acts were very similar and the charging language of the indictments would apply to the Penal Code as well. See Appendix I and J Pages 98 and 102

respectively. It was further stated that "The Commonwealth cannot be thwarted in its duties as a prosecutor because of an abstract supposition". See Appendix F, Page 89.

The Superior Court of Pennsylvania quashed the indictments for Bribery and Conspiracy see Appendix E. Page A 57 and 58. The Supreme Court of Pennsylvania conceded that Petitioners should have been indicted for Bribery and Conspiracy under the Penal Code. Appendix D. Page 45 but indicated that no harm would be done to the Petitioners if their criminality was determined under the Penal Code and apparently finding that the Petitioners would have been found guilty under both codes irrespectively of the fact that the Crime Codes changed the status of the offense from a misdemeanor to a Felony eliminated a defense, provided in the Penal Code, etc.

As to the charge generally referred to as theft by failure to account. The Trial Court conceded that acts took place which established an agreement and obligation of accounting between the Commonwealth, the insuring company and the Petitioners before the effective date of the Crime Code to wit: June 6, 1983, but held that no crime could be committed irrespective of a pre existing agreement and responsibility until the taking of the property occurred. See Appendix F. Page A 88. The Superior Court and the Supreme Court of Pennsylvania reached the same conclusions.

The Petitioners herein seek a Writ of Certiorari for reviewing the per curiam action of the Supreme Court, in denying application for Allowance of Appeal from judgement of March 8, 1985 in the Superior Court of Pennsylvania as well as the judgement of December 14, 1983 of the Supreme Court of Pennsylvania vacating an order of the Superior Court of Pennsylvania of September 25, 1981 quashing indictments against Petitioners for Bribery and Conspiracy and remanding indictment charges of Theft by failure to account to the Dauphin County Court of Common Pleas for a new trial.

WHY THE JURISDICTION OF THIS COURT IS INVOKED

Pursuant to the command of Rule 21 of this Honorable Court, applicable to reviews of judgments of a State Court we have set forth in the Statement of the Case considerable information as to the timing and methods used to focus the attention of the courts below on the issues to which this court's attention is now invoked. We now review the foregoing only to direct the court's attention to their constitutional aspects.

In summary the Petitioners were indicted by a Grand Jury of the Common Pleas Court of Dauphin County Pennsylvania on three charges, Bribery, Conspiracy and a purely statutory crime listed by said Dauphin County Court in brief as Theft by Failure to Make Required Disposition of Funds Received. Statutorially they involve 18 PA. S. 4701, 18 Pa. S. 903 an 18 Pa. S. 3927 respectively. A Printer's Rendition of a Certified Copy of each indictment will be found in Appendix H, I and J, Pages A 95 and A 98 and A 102.

There is no denial by anyone that the alleged conduct on the part of your Petitioners which resulted in the indictments for Bribery and Conspiracy occurred prior to June 6, 1973 the effective date of the legislation creating the crimes under which your Petitioners were indicted, nor is there any denial of the fact that in enacting said legislation provision was made by the General Assembly of Pennsylvania for the prosecution of crimes thereunder by previous existing legislative provisions where an element of the offense occurred prior to the effective date of said legislation. (See 18 Pa. Section 102, Act of Dec. 6, 1972, P. L., 1482 effective June 6, 1973 set forth herein inter alia in the Opinion of the Superior Court of Pennsylvania of Sept. 25, 1981, Appendix E., A 57. Nor is there any apparent denial that the occurrences, conduct and behavior on the part of Petitioners and others which created the known legal obligation and agreement to

make specified payments or other distribution of property involved in the indictments occurred before the effective date of the legislation under which the Petitioners were indicted. (See Appendix K, Page A 105.)

Why then do Petitioners seek Certiorari?

It is because the Courts below either ignore or treat with disdain, as trivia fundamental protections against ex post facto punishment, and the enjoyment of due process or apologize for the situation conceding that there was error in indicting your Petitioners under the wrong law, but indicating that there is no harm done since their conduct would have been equally punishable under both laws and that in punishment the entire situation will be treated in balance, irrespective of the fact that the law under which Petitioners were indicated increases punishment, changes the nature of the offense from a misdemeanor to a felony and deprives the Petitioners of a prior defense.

In connection with the trial court's commitment to keep the total picture in view at time of sentencing it may be observed that although all the Opinions referring to punishment indicate that the sentences were to run concurrently the actual sentences imposed, Appendix O, Page 123, reflects what the Petitioners heard as they were being sentenced, to wit, the sentences for the crimes of Bribery and Conspiracy, though running concurrent with each other, were to commence after the expiration of the sentence for Theft by Failure to Dispose of Property in Accordance with Agreement. Nor is there found in a sentence of 3 to 7 years any particular leniency.

As to the crime of Theft by Failure to Dispose of Property as per Agreement, Pa. S 3927 an attempt appears to be made to paper over the situation by conceding that conduct creating fiduciary relationship, which was allegedly violated, occurred before the property was acquired. No determination by the jury to this effect was made, and Petitioners believe that this court will decide

that an indispensable element of the crime occurred before the effective date of supplanting legislation. Petitions will explore this conclusion thoroughly in their Brief.

Petitioners are mindful of the interdiction of this court against arguments in this Petition and merely point out that supporting authority indicated in Table of Cases attached hereto refute practically all of the major positions of the trial court and the Supreme Court of Pennsylvania, (though not the Superior Court of Pennsylvania) have taken in the matter.

CONCLUSIONS

Protections against ex post facto punishment and the achieving of due process for the citizenry of this country were won at the price of blood, sweat, toil and tears, and are not to be sneered at as an abstract supposition, denegrated, ignored or denied.

WHEREFORE we seek the protection provided by Section 28, U.S.C., Section 1254, Paragraph 1.

Respectively submitted

_____

Charles W. Ohle, Petitioner

85-892

Supreme Court, U.S.
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October Term, 1984

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COMMONWEALTH OF PENNSYLVANIA,
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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 91 M.D. Allocatur Dk. 1985

COMMONWEALTH OF PENNSYLVANIA,
Respondent,

v.

RONALD J. JACKSON and CHARLES W. OHLE,
Petitioner

COMMONWEALTH OF PENNSYLVANIA,
Respondent

v.

CHARLES W. OHLE,
Petitioner

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal from the Judgment entered on March 8, 1985 in the Superior Court of Pennsylvania, Harrisburg District, at No. 103 and No. 106 March Term 1978, and No. 119 March Term 1979, affirming the Orders of the Dauphin County Court of Common Pleas at Nos. 1171, 1173, 1174 and 1179 C.D. 1975.

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August 27, 1985
Petition denied
Per Curiam

Supreme Court of Pennsylvania

Middle District

MILDRED E. WILLIAMSON
DEPUTY PROTHONOTARY

434 Main Capitol Building
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September 3, 1985

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P. O. Box 886
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Re: Commonwealth v. Ronald J. Jackson, Charles W. Ohle, Petitioners
No. 91 M. D. ALLOCATUR DOCKET 1985

Counsel:

This is to advise that on August 27, 1985, the Supreme Court entered its order DENYING the Petition for Allowance of Appeal filed in the above-captioned matter.

Very truly yours,

Mildred E. Williamson
Deputy Prothonotary

MEW/spb
cc: Katherine E. Holtzinger-Conner, Esquire
Hon. William W. Lipsitt

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MISC. DOCKET NO.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

v.

RONALD J. JACKSON and CHARLES W. OHLE,
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I. *REFERENCES TO THE OFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW*

The Opinion of the Dauphin County Court of Common Pleas is reported as *Commonwealth v. Ohle, et al.*, 100 Dauph. 95 (1978). The first Opinion of the Superior Court of Pennsylvania is reported as *Commonwealth v. Ohle*, 291 Pa. Super. 110, 435 A.2d 592 (1981). The Opinion of this Honorable Court is reported as *Commonwealth v. Ohle*, 503 Pa. 566, 470 A.2d 61 (1983). The subsequent Opinion of the Superior Court is unreported but is indexed at Nos. 103, 106 March Term, 1978 and No. 119 March Term, 1979.

II. *ORDER IN QUESTION*

JUDGMENT

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the Order and Judgment of the Court of Common Pleas of Dauphin County are affirmed.

/S/ Mildred E. Williamson

Deputy Prothonotary

Dated: March 8, 1985

III. *QUESTIONS FOR REVIEW*

A. WHETHER THE COMMENTS BY THE TRIAL JUDGE TO THE MEDIA DURING THE TRIAL PRESENT A QUESTION OF SUBSTANCE WHICH WAS RESOLVED BY THE SUPERIOR COURT IN A MANNER NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT?

B. WHETHER THE DECISION OF THE SUPERIOR COURT DENYING PETITIONER OHLE'S REQUEST FOR A NEW TRIAL BECAUSE OF A COMMONWEALTH WITNESS'S UNRESPONSIVE AND PREJUDICIAL REFERENCE TO PETITIONER'S PRIOR CRIMINAL CONDUCT IS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT?

C. WHETHER THE SUPERIOR COURT'S DECISION TO SUSTAIN THE CONVICTION OF PETITIONER OHLE DESPITE THE LACK OF CORROBORATION OF ACCOMPLICE TESTIMONY WAS CONTRARY TO LAW?

D. WHETHER THE SUPERIOR COURT'S DECISION DENYING THE REQUEST OF PETITIONER OHLE TO MERGE THE CHARGES OF CONSPIRACY AND BRIBERY WAS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT, AND PRESENTS A QUESTION NOT HERETOFORE DETERMINED BY THIS COURT?

IV. *STATEMENT OF THE CASE*

On July 1, 1972, the Commonwealth of Pennsylvania obtained a fleet automobile insurance policy from the Reserve Insurance Company of Chicago, Illinois. The policy period ran from July 1, 1972, through June 30, 1975. In February 1973, at the request of then Secretary of Property and Supplies, Frank C. Hilton, Commonwealth Director of Insurance, Anthony J. Trucco, met with Petitioner Ohle in New York. Testimony indicated that the purpose of the meeting was to arrange with Petitioners, (who were officers of Charles W. Ohle, Inc., insurance brokerage firm) to become the brokers of record on the aforesaid insurance policy. Testimony from Commonwealth witnesses indicated that Mr. Trucco requested that Mr. Ohle "kickback" a percentage of the premium money to Mr. Trucco in consideration for his being appointed broker. After an agreement was reached between Trucco and Petitioners, Charles W. Ohle, Inc., was appointed broker of record in April 1973.

Testimony from the Commonwealth witnesses indicated that during the last year of the three year policy a total of $1,015,000.00 was paid by the Commonwealth as premium payments. The premium payments were disbursed in three checks: one in the amount of $500,000.00 dated July 25, 1974, one in the amount of $300,000.00 dated August 5, 1974, and the final check in the amount of $215,000.00 dated September 26, 1974. All three checks were made co-payable to the firm of Charles W. Ohle, Inc., and Market Facilities, Inc., a subsidiary corporation of the Reserve Insurance Company. Testimony of officials of the Reserve Insurance Company showed that Charles W. Ohle, Inc., was specifically authorized by the Company to endorse the checks and deposit the checks into the Charles W. Ohle, Inc., bank account. Testimony of Commonwealth witnesses indicated that a portion of the premium was paid back to Mr. Trucco in accordance with the original agreement.

On January 16, 1975, Reserve Insurance Company delivered a letter to the Commonwealth indicating that the aforementioned fleet automobile insurance policy would be cancelled effective January 27, 1975 for nonpayment of premium. The

Commonwealth subsequently secured an alternate policy, and the original Reserve policy was terminated. Suit was filed by the Reserve Insurance Company against the Commonwealth demanding payment of the unpaid premium.

On March 24, 1975, the Commonwealth filed an Answer establishing by way of demurrer and New Matter the Commonwealth's position that payment to the broker constituted payment of the premium to the insurance company. Subsequently, Petitioners were charged with three counts of theft by failure to make required disposition of funds received relating to the three premium payments and charges of bribery and conspiracy in obtaining the policy. Pursuant to Petitioners' Pre-Trial Severance Motion the theft charges were severed from the conspiracy and bribery charges and Petitioners were tried before two separate juries.

The first trial commenced on June 1, 1977, on the charges of theft by failure to make required disposition of funds received. At the conclusion, Petitioners demurred to the evidence on the jurisdiction issue. The Court had previously agreed with Petitioners that the jurisdiction issue presented questions of law and fact and that the Court would decide the issue initially, and if necessary, present it to the jury for a factual determination. The Court overruled Petitioners' demurrer and while the trial was still in progress informed the news media of its decision. When the Court reconvened it was discovered that three jurors and two alternates obtained knowledge of the judges decision on the jurisdiction issue through the media. Petitioners promptly moved for a mistrial. After the trial Judge confirmed that three of the jurors and both alternates had read or heard news accounts of the decision, he attempted to correct the error by providing curative instructions to the jury. The Motion for mistrial was then denied and the jury subsequently returned verdicts of guilty against both Petitioners.

Significantly, the jurisdiction issue represented the substance of Petitioners' entire factual defense in the first trial. As a

result of the importance of this issue, Petitioners argued the demurrer, in camera, to preserve the integrity of the factual issue for the jury. Unfortunately, these efforts were undermined by the trial Judge's comments to the media.

The second trial began on November 15, 1977, on the charges of bribery and conspiracy. Petitioner Jackson became ill during the trial, and a mistrial was granted to him. The only Commonwealth witnesses called relative to the charges against Mr. Ohle were Mr. Noel Bernard, an official of the insurance company, and Mr. Anthony Trucco, Commonwealth Director of Insurance. Both of these witnesses were named in the conspiracy indictment as co-conspirators. During the trial, Mr. Trucco, in an unresponsive answer to a question on cross-examination, referred to Petitioner Ohle's previous theft conviction. A prompt motion for mistrial was denied by the Court.

At the conclusion of the trial, Petitioner Ohle requested and received a charge by the Court that he could not be convicted on the testimony of an accomplice without corroboration. Additionally, Petitioner Ohle excepted to the Court's charge that the crimes of bribery and conspiracy were two separate crimes. The jury returned a verdict of guilty against Petitioner Ohle and these appeals followed.

V. *REASONS RELIED UPON FOR ALLOWANCE OF APPEAL*

An appeal should be allowed in these consolidated cases because questions of substance not heretofore determined by this Court are presented, and because the Superior Court has decided questions of substance in a manner at variance with the applicable decisions of this Court.

A. THE COMMENTS BY THE TRIAL JUDGE TO THE MEDIA DURING THE TRIAL PRESENT A QUESTION OF SUBSTANCE WHICH WAS RESOLVED BY THE SUPERIOR COURT IN A MANNER NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

During the trial on the theft charges, Petitioners Ohle and Jackson consistently elicited testimony from the Commonwealth's witnesses in an effort to establish that the crime, if committed, was committed in the State of New York. The purpose of these questions was to establish factually and as a matter of law that the Pennsylvania Courts were without jurisdiction. At the conclusion of the Commonwealth's case, Petitioners argued motions in the nature of a demurrer, in Chambers. Among the arguments presented by Petitioners was the issue of the Court's jurisdiction. Significantly, the jurisdictional defense was the only factual defense presented by the Petitioners at trial. The Court was then recessed for the weekend.

When counsel departed chambers, they were confronted by members of the news media for information regarding the matters argued. From counsel the press learned only that motions had been made, and that the Court had taken the motions under advisement. Shortly thereafter the reporters entered Chambers and were told by the Court that the motions on jurisdiction, had been denied. This resulted in extensive publicity in the local newspaper and on the radio.

When the Court reconvened on Monday morning, Petitioners moved for a mistrial. Through questioning the jurors, the Court learned that several admitted to hearing the radio or newspaper publicity. The Court then attempted to cure the error by

instructing the jury that it should not be influenced by the Court's decision that jurisdiction lay in Pennsylvania.

In analyzing the trial Judge's comment to the media to determine whether it prejudiced the integrity of the trial, there are six significant facts that need to be considered. First, the jurisdictional defense was the only defense presented by Petitioners at trial. Second, counsel for Petitioners were careful during trial to argue the merits of the jurisdictional issue outside the jury's presence. Third, jurisdiction is a conceptually difficult issue for a juror; consequently, the Judge's decision was particularly prejudicial. Fourth, the influence of a trial judge's opinion on a jury is inherently prejudicial because of the esteem in which the Court is held. Fifth, although only three jurors and two alternates admitted to learning of the trial Court's decision through the media, all jurors were informed of the Judge's opinion prior to deliberating on the issue. Finally, there was absolutely no reason for the jurors to be informed of the trial Judge's decision on the jurisdiction issue prior to their deliberations.

It is well established that:

> Every unwise or irrelevant remark made in the course of a trial by a judge, a witness, or counsel does not compel the granting of a new trial. *A new trial is required when the remark is prejudicial; that is, when it is of such a nature or substance or delivered in such a manner that it may be reasonably said to have deprived the defendant of a fair and impartial trial*. (Emphasis in original) [Citing cases].

Commonwealth v. Goosby, 450 Pa. 609, 611, 301 A.2d 673, 674 (1973). The substance of the trial Judge's comment in this case was prejudicial because of the factors stated above, and because it deprived Petitioners of a fair and impartial trial. The great potential for a comment by a trial judge to constitute incurable prejudice has been strongly endorsed by this Court. "It is a maxim of our jurisprudence that a trial judge occupies an exalted and dignified position and that absolute impartiality in the conduct of the trial is expected of him." *Commonwealth v. England*,

474 Pa. 1, 16, 375 A.2d 1292, 1299 (1977). The overwhelming influence of a trial judge on a juror has been described by Dean Burton R. Laub in the *Pennsylvania Trial Guide*, §155 (1959):

> Many jurors see in the trial judge the epitome of the majesty of the law; his words being an *ex cathedra* expression of both the law and the facts. In consequence, they seek constantly for an expression, the flick of an eyelid or the tone of the judge's voice to indicate how they should find. With due reverence for his position, experience and training, they hope to find in the charge some guidepost for their own actions. . . .

In the instant case, Petitioners with the cooperation of the Court were able to preserve the integrity of the jurisdictional factual issue by arguing the demurrer in Chambers. unfortunately, the Judge disclosed to the media his opinion that the Court had jurisdiction over the defense. In attempting to cure his acknowledged error, the trial Judge charged the jury as follows:

> . . . Because [jurisdiction] is a mixed question of law and fact, the Court is going to let the jury decide this matter. So I tell you that I do not want you to be influenced by anything that you heard in the media, because the final decision as to whether the facts conform to the law, or whether the facts fall into the law or whether the law falls into the facts, whichever you look at it, is going to rest with you, the members of the jury, and you should be uninfluenced by anything you read. And indeed, when the case is presented by one side, in this case, the Commonwealth, the question that comes before a Judge on the demurrer is merely a prima facie decision, that is the Court does not take away any authority from the jury to find a decision based upon its conception of what the facts are. So we just make, as a member of the Court, the Court merely makes an initial decision, if that is the way you want to look at it, but the final decision rests with you.

Rather than curing the error with this instruction, the Judge inadvertently compounded the prejudice by emphasizing his "initial decision" to the entire jury. As this Court pointed out in *Commonwealth v. Horvath*, 446 Pa. 11, 285 A.2d 185, 186 (1971): "To compound a trial error by emphasizing the tainted evidence in the jury charge would probably, by itself, be sufficient under *Chapman* [v.*California*, 386 U.S. 18] to render the error not harmless." When the jury retired to deliberate on the jurisdiction issue, the only significant area of factual dispute and on which essentially hinged Petitioners' entire defense, the jurors already knew the Judge's opinion with regard to jurisdiction.

B. THE DECISION OF THE SUPERIOR COURT DENYING PETITIONER OHLE'S REQUEST FOR A NEW TRIAL BECAUSE OF A COMMONWEALTH WITNESS'S UNRESPONSIVE AND PREJUDICIAL REFERENCE TO PETITIONER'S PRIOR CRIMINAL CONDUCT IS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

During cross-examination by Petitioner's counsel in the November 15, 1977 trial, Commonwealth witness Anthony J. Trucco was asked to explain the meaning of an earlier plea of guilty to an extortion charge. As questioning proceeded, Mr. Trucco indicated that despite his guilty plea, he had not extorted money from Petitioner Charles W. Ohle. After Mr. Trucco has been reminded of the elements of extortion, including the element of inducing consent through the use of fear, the following series of questions and answers occurred:

Q: BY DEFENSE COUNSEL:

You told Judge Nealon that you had extorted money from Mr. Ohle through the wrongful use of fear?

A: BY MR. TRUCCO:

That's correct.

Q: Now, I ask you again when you got kickbacks from Mr. Ohle, did you get it through the wrongful use of fear?

A: Absolutely not. No way was there any fear. Absolutely not.

Q: Did you plead guilty in Federal Court to the [sic] crime that you didn't commit?

A: I don't know that. I pleaded guilty to that charge that they were charging me with for one reason. I knew I was guilty of wrongdoing and *I knew at that point when these gentlemen stole $765,000* (emphasis added).

As soon as Mr. Trucco made this impermissible reference to Petitioner Ohle's theft conviction, Petitioner requested a mistrial. The motion was denied, and cautionary instructions were given to the jury.

Before the commencement of the first trial on three counts of theft by failure to make required disposition of funds, Petitioner Ohle filed a pretrial motion to sever the theft charges from the bribery and conspiracy charges. This motion was granted and two separate trials were conducted. The purpose of the severance was to avoid tainting the jury in its deliberation on the conspiracy and bribery charges through the consideration of evidence relating to theft. Moreover, the conduct supporting the bribery and conspiracy charges had occurred approximately two years and six months before the theft offense. The unresponsive and prejudicial comment of the Commonwealth witness destroyed the effect of Petitioner's severance motion and presented the jury with incurably prejudicial evidence of prior criminal conduct.

Evidence of the prior criminal conduct was particularly prejudicial because of the inference to the jury that Petitioner had been convicted of the theft of the Commonwealth's insurance premium. This tainted the Jury's ability to decide fairly and impartially the charge of bribery and conspiracy in obtaining the insurance contract, because the jury was told that Petitioner had stolen the proceeds of the very same contract.

In deciding against Mr. Ohle on this issue, the Superior Court incorrectly applied the standard enunciated by this Court in *Commonwealth v. Grant*:

> We believe that the alleged prejudicial comments must be evaluated with regard to the circumstances of each trial, including, but not limited to: the nature of the comment, the person to whom the alleged prejudicial comment was directed, the identity of the person making the comment, and if a witness, the importance of that witness' testimony to either the Commonwealth's or defense's case, and whether the Court gave immediate cautionary instructions if it deemed the remark prejudical.

479 Pa. 74, 387 A.2d 841, 844 (1978). This Court has supplied further guidelines for consideration of this issue and these guidelines were recently repeated by the Superior Court in *Commonwealth v. Gaerttner*, Pa. Super. , 484 A.2d 92, 106 (1984) as follows:

> Although there is no *per se* rule concerning the admission of evidence pertaining to prior convictions, certain principles may be distilled from the cases. Reference to a criminal defendant having been in jail clearly and unmistakingly indicates a prior criminal conviction and the remark is prejudicial. *Commonwealth v. Clark*, [453 Pa. 449, 309 A.2d 589 (1973)].
>
> When such a remark is introduced, a mistrial need not necessarily be granted if there are other factors to satisfy the requirement that the appellant receive a fair trial. A crucial consideration is whether the remark was intentionally elicited by the Commonwealth. . . . A corollary to this is whether the answer is responsive to the question asked . . . In addition, the question of whether curative instructions were given is of great import. [Citations omitted.].

The potential for reversible error as a result of the admission of evidence of prior convictions or criminal conduct is readily acknowledged:

> In general, admission of testimony which details, or from which the jury may reasonably infer, past criminal conduct on the part of a defendant constitutes reversible error. . . .

> The purpose of this rule is to . . . preclude the inference that because he has committed other crimes he was more likely to commit that crime for which he is being tried. *Commonwealth v. Trowery*, 211 Pa. Super. 171, 173, 235 A.2d 171, 172 (1967).

Commonwealth v. Colon, 264 Pa. Super. 314, 399 A.2d 1068, 1971 (1979). *See, Commonwealth v. Nichols*, 485 Pa. 1, 4, 400 A.2d 1281, 1282 (1979). In *Commonwealth v. Spruill*, 480 Pa. 601, 605, 391 A.2d 1048, 1050 (1978), this Court described the effect of evidence of past criminal conduct as follows:

> The presumed effect of such evidence is to predispose the minds of the jurors to believe the accused guilty, and thus effectually to strip him of the presumption of innocence. . . . [Citations omitted.]

The application of the above principles to the facts of this case supports the conclusion, contrary to the decision of the Superior Court, that incurable, prejudicial error resulted from the jurors hearing the comment of the Commonwealth's witness. First, Mr. Trucco's comment was unresponsive to defense counsel's questioning and totally unexpected. Second, it undermined Petitioner's trial strategy by defeating the purpose of his severance motion. Finally, it created the inference that Mr. Ohle had participated in prior criminal conduct or had been convicted for criminal conduct related to the charges for which he was being tried. The combination of these three significant factors deprived Mr. Ohle of his presumption of innocence and denied him a fair trial. Despite cautionary instructions, the prejudice produced by Mr. Trucco's unresponsive comment was not capable of cure. Consequently, the Superior Court failed to decide this issue in accordance with the standards enunciated in prior decisions of this Court.

C. THE SUPERIOR COURT'S DECISION TO SUSTAIN THE CONVICTION OF PETITIONER OHLE DESPITE THE LACK OF CORROBORATION OF ACCOMPLICE TESTIMONY WAS CONTRARY TO LAW.

Under the Penal Code, 18 P.S. §2, repealed Act of December 6, 1972, Public Law 1482, No. 345, §5, effective June 6, 1973, it is provided that in a bribery case an accused shall not be convicted on the testimony of an accomplice unless the same be corroborated by other evidence or the circumstances of the case. Petitioners were charged under the Crimes Code which has no such provision as the Penal Code; however, the Superior Court held on the first appeal that Petitioner Ohle was improperly charged under the Crimes Code, rather than the Penal Code which was in effect when certain elements of the bribery and conspiracy offenses were committed. *Commonwealth v. Ohle*, 291 Pa. Super. 110, 435 A.2d 592 (1981). This Court, although reversing the Superior Court's decision, did agree that the substantive provisions of the Penal Code applied. *Commonwealth v. Ohle*, 503 Pa. 566, 470 A.2d 61, 70-1 (1983).

Petitioner Ohle's conviction in the second trial was based solely upon the testimony presented by accomplices. In presenting its case the Commonwealth produced three witnesses: Noel Bernard, Anthony Trucco and John Tickner. The testimony of Mr. Tickner, Vice President and General Counsel of the Reserve Insurance Company, was very brief and did not relate to Petitioner Ohle. Thus, the only evidence against Petitioner Ohle was the testimony of the other two witnesses who were also accomplices. Mr. Trucco and Mr. Bernard were accomplices in the conspiracy charge because they were both named in the indictment as parties to the illegal agreement and this allegation was supported by the evidence at trial. Although Mr. Bernard was not named in the bribery indictment, the record clearly substantiates that at the very minimum he aided and abetted Trucco and Ohle in the bribery offense. Therefore, the record must contain evidence of other corroboration to sustain the conviction of Petitioner Ohle on the bribery and conspiracy charges.

Significantly, Petitioner Ohle did not present any evidence at trial, and the Commonwealth failed to corroborate the testimony of Mr. Bernard and Mr. Trucco. Therefore, contrary to the Superior Court's decision, the Penal Code requires reversal of Petitioner Ohle's conviction.

D. THE SUPERIOR COURT'S DECISION DENYING THE REQUEST OF PETITIONER OHLE TO MERGE THE CHARGES OF CONSPIRACY AND BRIBERY WAS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT, AND PRESENTS A QUESTION NOT HERETOFORE DETERMINED BY THIS COURT.

The doctrine of merger as enunciated in *Commonwealth v. Nelson*, 452 Pa. 275, 305 A.2d 369 (1973) is well established. The doctrine of merger applies when one crime *necessarily involves* the other. *Commonwealth ex rel. Moszczynski v. Ashe*, 343 Pa. 102, 21 A.2d 920, 921 (1941):

> It is well settled that for one crime to necessarily involve another the essential elements of one must be the essential elements of the other. . . . That is, if no additional facts are needed to prove the additional offense, it merges into the primary offense. . . .

Commonwealth v. Maddox, 307 Pa. Super. 524, 453 A.2d 1010, 1015 (1982).

The doctrine of merger should apply to the facts of this particular case because the elements of both crimes are identical and the proof of one offense completes the proof of the other without any additional elements. To convict Mr. Ohle of bribery it was only necessary for the Commonwealth to prove that he agreed to confer a benefit on a public servant in consideration for being appointed broker for the Commonwealth's fleet automobile insurance policy. To convict Mr. Ohle of conspiracy, it was likewise only necessary to prove that he had agreed to confer a pucuniary benefit on Mr. Trucco in consideration for obtaining the brokerage of Pennsylvania's fleet automobile insurance policy. The gravamen of the offense in both cases is the agreement,

which in this particular case was one and the same. The prosecution of Petitioner Ohle on both conspiracy and bribery charges under the facts of this particular case amounts to an unjustifiable pyramiding of criminal liability for the same conduct.

It is important to recognize that the offense of conspiracy was complete the moment Petitioner Ohle agreed to pay the percentage of the premium funds requested by Mr. Trucco in exchange for being appointed broker on the policy. Similarly, the offense of bribery was complete at the same instant. 18 P.S. §4303, Act of July 31, 1963, P.L. 421, §1 (Penal Code); 18 Pa.C.S.A §4703 (Crime Code). The Commonwealth did not need to prove any additional elements to sustain the bribery conviction other than the existence of the conspiracy. The fact that a "kickback" was subsequently paid to the co-conspirator was not an additional element of either offense.

It is conceded that, generally speaking, the offense of conspiracy is a separate and distinct crime from other substantive offenses which are proscribed by the Penal Laws of the Commonwealth.

> It is worthwhile to note preliminarily that conspiracy as an offense has two different aspects, reflecting different functions it serves in the legal system. In the first place, it is an inchoate crime, complementing the provisions dealing with attempt and solicitation in reaching preparatory conduct before it has matured into the commission of a substantive offense. Secondly, it is a means of striking against the special danger incident to group activity, facilitating prosecution of the group and yielding a basis for imposing added penalties when combination is involved.

S. Toll, *Pennsylvania Crimes Code Annotated*, §903, at 231 (1974). The comment to the Crimes Code is consistent with the dual rationale barring the application of the merger doctrine in situations where a defendant is charged with conspiracy and a separate substantive offense. The first rationale recognizes the significant societal need to deal with criminal activity before a substantive crime is committed. The second rationale recognizes

the special danger of concerted group activity. Accordingly, conspiracy to commit substantive crimes such as robbery, murder, burglary and other similar crimes, are separate and distinct from the conspiracy itself. Conviction of conspiracy to commit these crimes is possible even though the substantive offenses never come to fruition.

In this particular case, however, neither of the reasons which argue against merger are present. Here Mr. Ohle's co-conspirator is the same individual who requested and accepted Mr. Ohle's agreement to "kickback" a percentage of the insurance premium. Significantly, the conspiracy was *not* complete before the actual commission of the substantive crime, i.e. the bribery. Both crimes matured at the same instant. There was no opportunity for law enforcement authorities to impede or hinder the commission of the substantive offense, (i.e., the bribery) before the crime was actually committed. This is true because the conspiracy and bribery occurred simultaneously. Furthermore, in this particular case, Mr. Ohle's co-conspirator was the official soliciting the kickback and his involvement was absolutely essential to the commission of the substantive offense. In other words, bribery by its very nature requires concerted action and at least the involvement of two individuals. Consequently, the conspiracy in this case did not present any additional danger incident to concerted criminal activity. The reasons justifying the treatment of conspiracy as a separate offense are not present in this case.

There are no existing decisions by this Court discussing the doctrine of merger as it would apply to conspiracy and bribery. In reviewing the circumstances of this case, it is clear that the record and evidence support the rationale for the application of the doctrine of merger to the conspiracy and bribery charges. This Court should not adhere to a ruling supporting the distinction between conspiracy and a resulting substantive offense when the reasoning supporting that rule is not applicable. Consequently, this Court should address the doctrine of merger presented by the particular facts of this case.

VI. *CONCLUSION*

WHEREFORE, Petitioners Ohle and Jackson respectfully request that this Court grant their Petition for Review.

Respectfully submitted,

KILLIAN & GEPHART

By:_____

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Attorneys for Appellants

Dated: April 8, 1985

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the aforegoing Petition and Appendix was forwarded by first class mail, postage prepaid, to the following person:

Richard A. Lewis
District Attorney
Dauphin County
Dauphin County Courthouse
P. O. Box 1109
Harrisburg, PA 17108

_____

Smith B. Gephart

Dated: April 8, 1985

APPENDIX C

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
RONALD J. JACKSON, *Appellant*	:	No. 00103 MAR 78

Appeal from the Judgment of Sentence of April 21, 1978 in the Court of Common Pleas of Dauphin County, Criminal Division, at No. 1179 C.D. 1975.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
CHARLES W. OHLE, *Appellant*	:	No. 00106 MAR 78

Appeal from the Judgment of Sentence of April 21, 1978 in the Court of Common Pleas of Dauphin County, Criminal Division, at Nos. 1171, 1173, 1174 C.D. 1975.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
CHARLES W. OHLE, *Appellant*	:	No. 00119 MAR 79

Appeal from the Order entered on June 8, 1979 in the Court of Common Pleas of Dauphin County, Criminal Division, at Nos. 1171 & 1173 C.D. 1975.

Before: WICKERSHAM, JOHNSON, and HOFFMAN, JJ.

MEMORANDUM: FILED: MARCH 8, 1985

This case has been remanded to us for the disposition of appellants' remaining contentions following our Supreme Court's reversal of this Court's grant of a new trial. *See Commonwealth v. Ohle*, 503 Pa. 566, 470 A.2d 61 (1983). Appellants[1] contend that the lower court erred in refusing to grant a mistrial after the trial judge revealed to the news media that he had denied appellants' demurrer challenging jurisdiction. We disagree. The local newspaper and radio simply reported that the motion had been denied. When trial resumed following these reports, appellants made a motion for a mistrial which was denied. (N.T. June 1, 1977 at 310, 316). The court then questioned the jury and ascertained that three jurors and both alternates had seen or heard the reports. (*Id.* at 321-22). The jurors were cautioned to disregard the reports, reminded that the final decision regarding the facts rested with them, and asked whether any of them felt unable to be impartial. None of the jurors indicated that his or her judgment would be affected, and the trial continued. (*Id.* at 322-23).[2]

> "Every unwise or irrelevant remark made in the course of a trial by a judge, a witness, or counsel does not compel the granting of a new trial. *A new trial is required when the remark is prejudicial; that is, when it is of such a nature or substance or delivered in such a manner that it may be reasonably said to have deprived the defendant of a fair and impartial trial.*"

Commonwealth v. Nesbitt, 276 Pa. Superior Ct. 1, 6, 419 A.2d 64, ____(1980), *quoting Commonwealth v. Goosby*, 450 Pa. 609,

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1. Both appellants appeal from the judgment of sentence following their joint trial for theft by failure to make required disposition of funds. Appellant Ohle also appeals from his judgment of sentence following a later trial on bribery and conspiracy charges. During the course of that trial, appellant Jackson became ill and a mistrial was granted to him individually.

2. Appellants claim that they renewed their motion for a mistrial after the court gave its cautionary instruction. (Appellant's Brief at 13). However, that assertion is controverted by the record. *See* N.T. June 1, 1977 at 323-24.

611, 301 A.2d 673, 674 (1973). Furthermore, in order for appellant to be denied a fair trial because of publicity, such publicity must be "inherently prejudicial." *Commonwealth v. Casper*, 481 Pa. 143, 392 A.2d 287 (1978); *Commonwealth v. Kichline*, 468 Pa. 265, ____A.2d ____(1976). Here, we cannot say that the factual report of the trial court's denial of appellants' demurrer was so inherently prejudicial as to deny appellants a fair trial. Any prejudice which may have been created by the reports was cured by the trial court's cautionary instruction to the jury.

Appellant Ohle also contends that he was entitled to a mistrial following an impermissible reference to his past criminal conduct. In response to cross-examination by defense counsel concerning a Commonwealth witness's plea of guilty to federal charges of extortion, the witness replied:

> I don't know that. I pleaded guilty to that charge that they were charging me with for one reason. I knew that I was guilty of wrong-doing and I knew at that point when these gentlemen stole $765,000 — — — —

(N.T. November 16, 1977 at 134). At that point, defense counsel objected and made a motion for a mistrial out of the jury's hearing . (*Id.* at 135-36). The trial court denied the motion but gave the jury a cautionary instruction. (*Id.* at 136-39).

Ordinarily, the admission of testimony describing or raising the inference of past criminal conduct by a defendant constitutes reversible error. *Commonwealth v. Nichols*, 485 Pa. 1, 4, 400 A.2d 1281, 1282 (1979); *Commonwealth v. Colon*, 264 Pa. Superior Ct. 314, 321, 399 A.2d 1068, 1071 (1979). However, an isolated passing reference to prior criminal activity will not warrant reversal unless the record indicates that prejudice resulted from the remark. *Commonwealth v. Nichols, supra; Commonwealth v. Bowermaster*, 297 Pa. Superior Ct. 444, 451, 444 A.2d 115, 118 (1982). No *per se* rule requires a new trial for every passing reference to prior criminal conduct, *Commonwealth v. Richardson*, 496 Pa. 521, 526, 437 A.2d 1162, 1165 (1981); *Commonwealth v. Bowermaster, supra*. In certain circumstances, the possible prejudicial effect of a reference to such conduct may be removed by a cautionary instruction. *Commonwealth v.*

Richardson, supra. In *Richardson*, our Supreme Court held that the trial court properly refused a mistrial when a defense witness testified on cross-examination to prior criminal conduct by the defendant. In so holding, the Court focused upon the nature of the remark, the fact that it was not deliberately introduced or exploited by the Commonwealth and the prompt curative instructions given by the trial court.

Similarly, in the instant case, appellant's own counsel elicited the objectionable remark and it was an isolated reference which was not repeated or otherwise emphasized. Accordingly, any prejudice which may have resulted was remedied by the court's prompt and thorough curative instruction. Furthermore, where this court is convinced beyond a reasonable doubt that the admission of testimony concerning prior criminal conduct did not contribute to the verdict, we may hold that reversal is not required because the error was harmless. *Commonwealth v. Weakland*, 273 Pa. Superior Ct. 361, 369, 417 A.2d 690, ____ (1979). Here, our review of the record convinces us that the witness's remark does not constitute reversible error in light of the overwhelming volume of evidence introduced against appellant Ohle. Accordingly, we hold that the lower court properly denied the request for a mistrial.

Appellant Ohle also contends that the lower court erred in refusing to dismiss (1) the charge of conspiracy on the ground of merger and (2) the entire prosecution because it was based solely upon the uncorroborated testimony of accomplices. We find that the lower court opinion has adequately addressed these issues and, accordingly, affirm.

Affirmed.

IN THE SUPERIOR COURT OF PENNSYLVANIA
HARRISBURG DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	No. 103 March Term, 1978
RONALD J. JACKSON, *Appellant*	:	
COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	No. 106 March Term, 1978
CHARLES W. OHLE, *Appellant*	:	
COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	No. 119 March Term, 1979
CHARLES W. OHLE, *Appellant*	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the Order and Judgment of the Court of Common Pleas of Dauphin County are affirmed.

_____

Deputy Prothonotary

Dated: March 8, 1983

APPENDIX D

IN THE SUPREME COURT OF PENNSYLVANIA
HARRISBURG DISTRICT

Commonwealth of Pennsylvania, *Appellant*	:	
	:	
v.	:	No. 4 M. D. Appeal Docket 1982
Charles W. Ohle, and Ronald J. Jackson	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the Orders of the Superior Court are vacated in part and remanded for proceedings consistent with this opinion.

_____

Deputy Prothonotary

Dated: December 14, 1983

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, *Appellant*	: No. 4 M.D. Appeal Docket 1982 : : Appeal from the Order of the Superior Court of Pennsylvania at Nos. 103 and 106 March Term, 1978, and No. 119 March Term, 1979, Reversing the Order of the Court of Common Pleas of Dauphin County, Criminal Division, Entered March 30, 1978, at Nos. 1171, 1173, 1174, 1179 C.D. 1975 : : 291 Pa. Superior Ct. 110, 435 A.2d 592 (1981)
CHARLES W. OHLE and RONALD J. JACKSON, *Appellees*	: : : ARGUED: May 27, 1983

OPINION OF THE COURT

HUTCHINSON, J. FILED: DECEMBER 14, 1983

The Commonwealth appeals by allowance Superior Court's orders reversing judgments of sentence Dauphin County Common Pleas imposed on appellees. Superior Court granted appellees a new trial after a jury convicted them of theft, and quashed additional indictments against appellee Ohle for bribery and conspiracy.[1] All these arose out of a kickback scheme in-

1. Bribery and conspiracy charges against Jackson were not before Superior Court, but remain pending after a mistrial.

Opinion of the Supreme Court dated December 14, 1983 reported at 470 A.2d 61 (1983).

volving Pennsylvania's former Secretary of Property and Supplies, Frank Hilton, who had the power to enter into insurance contracts on behalf of the Commonwealth. We vacate Superior Court's order and remand this record to it for further proceedings consistent with this opinion.

I

Appellees Charles W. Ohle and Ronald J. Jackson, officers of a New York insurance brokerage firm, were charged with three counts of theft by failure to make required disposition of funds to the insurance carrier which underwrote an auto fleet policy for the Commonwealth of Pennsylvania; bribery in official and political matters, and conspiracy to commit bribery in connection therewith. All these charges arose out of their participation in the Hilton kickback scheme.

In June of 1977, they were tried jointly on the theft charges and convicted. In November, 1977, a joint trial on the bribery and conspiracy charges began. Jackson became ill and a mistrial was declared as to these charges against him. *See supra* n. 1. Ohle's trial continued. He was convicted of both bribery and conspiracy.

On the theft charges the trial court sentenced Ohle and Jackson to pay a fine of $1,000 and the costs of prosecution, to make restitution of $304,500 each to the Commonwealth and to terms of three to five years imprisonment. Ohle was also sentenced to pay a fine and serve a term of one to two years, concurrent with the theft sentence on the conspiracy charge; for bribery he received a $500 fine and six months to one year in prison, concurrent with his sentences for theft and conspiracy. All sentences were under our former Penal Code.

Both Ohle and Jackson filed post-trial motions for new trials and in arrest of judgment. Dauphin County Common Pleas heard and denied them *en banc*. 100 Dauph. 95 (1978). They appealed to Superior Court. It reversed the theft convictions of both and remanded those cases for a new trial. It not only reversed Ohle's convictions for bribery and conspiracy, but also quashed the indictments on these charges. 291 Pa. Superior Ct.

110, 435 A.2d 592 (1981). It determined he was improperly indicted under our present Crimes Code because elements of both crimes occurred before its effective date, and an "affirmative defense" to a charge of bribery, available under the Penal Code, was not available under the Crimes Code.[2]

Superior Court held that the trial court had jurisdiction to hear the theft charges despite the fact that the inaction which Pennsylvania would consider a failure to make required disposition of funds occurred in New York. Nevertheless, it also held that Common Pleas erred in refusing appellees' requests to charge the jury on various aspects of New York insurance law and by failing to direct the jury to find appellees not guilty if their failure to remit to the insurance carrier was not illegal under New York civil law governing insurance brokers.

For the reasons which follow, we vacate these orders of Superior Court and remand to it for disposition of the remaining issues, consideration of which was unnecessary under the orders we now vacate.[3]

II

The factual background of this case, while involved, is not in dispute. The thefts involved premiums of more than one million dollars for the Commonwealth's insurance policy covering its automobile fleet. These were due the Reserve Insurance Company

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2. The Crimes Code, Act of December 6, 1972, P.L. 1482, effective June 6, 1973, 18 Pa.C.S. §101 *et seq.*, replaced the Penal Code, June 24, 1939, P.L. 872.

3. Because of its determination of the jury charge and indictment issues, Superior Court did not address other allegations of trial error made by appellees. These issues are: (1) failure of the trial court to grant a mistrial after revealing its decision to deny appellees' demurrer to the evidence to the news media, which report was read by several jurors; (2) refusal of the trial court to dismiss the conspiracy charge on grounds of merger; (3) refusal of the trial court to dismiss the bribery and conspiracy charges because only uncorroborated testimony of accomplices was introduced; (4) refusal of the trial court to grant a mistrial based on a Commonwealth witness's reference to appellee's prior criminal record. (The last three allegations of error apply only to appellee Ohle). Based on our resolution of the Commonwealth's appeal, we remand these issues to Superior Court so that it may properly determine their merits.

of Chicago, Illinois (Reserve), through Charles W. Ohle, Inc., a New York brokerage firm. Defendants were the principals of that broker. Ohle is a resident of New York and Jackson is a resident of New Jersey. On July 25, 1974 a Commonwealth premium check for $500,000.00 payable to Market Facilities, Inc., a subsidiary of Reserve, and Charles W. Ohle, Inc., the broker, was delivered to the latter. On August 5, 1974 a second check for $300,000.00 payable to the same Reserve subsidiary and Charles W. Ohle, Inc. was also delivered to it. Finally, on September 26, 1974 a check for $215,000.00 payable to the same payees was also delivered to Charles W. Ohle, Inc.

Defendants caused these payments to be deposited in the brokerage firm's account without the other payee's endorsement.[4] Then, through their control of the brokerage account, they withheld more than $600,000 admittedly due Reserve. The issue of whether the withheld funds are due Reserve was the subject of Reserve's civil action against the Commonwealth. The outcome of that action is not shown on this record.

After the theft charges were filed, our Department of Justice brought additional charges of bribery and conspiracy against defendants. These were the subject of the second trial. The testimony produced showed that from February, 1973 through September, 1974 defendants made kickback payments totalling approximately $176,000.00 to Frank Hilton and Anthony Trucco. Hilton was then Secretary of Property and Supplies for the Commonwealth of Pennsylvania. Trucco was the Director of that Department's Insurance Division. The kickbacks were in consideration of Hilton's appointment of Charles W. Ohle, Inc. as broker for the automobile fleet insurance policy.

The discussions which led to Hilton's appointment of defendants' New York corporation as broker in consideration of their kickback agreement began in February, 1973, before the effective date of our Crimes Code, *see supra* at n. 2, when co-conspirator Trucco met with defendant Ohle in New York City.

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4. Although the checks were co-payable as mentioned previously, the defendants were authorized by the insurance company to endorse and deposit the checks into the Charles W. Ohle, Inc. bank account.

At that time the crimes of bribery and conspiracy were governed by the Penal Code. Nevertheless, the indictments used the language of the Crimes Code in making these charges. The complaint, however, had alternatively cited both the Penal Code and Crimes Code sections.

III

Superior Court correctly held defendants indictment for the theft offense fell under the Crimes Code, rather than the Penal Code, and that Dauphin County Common Pleas had jurisdiction to hear the case.[5] However, Superior Court erred in reversing appellees' convictions and remanding for a new trial. Superior Court held the trial court erred in refusing to charge the jury on the New York civil law of insurance. Superior Court would have

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5. Appellees do not now challenge either of these holdings. With respect to which statute applies, the transitional savings clause appended to the official version of the Crimes Code provides, in relevant part: "[f]or the purpose of this section, an offense was committed prior to the effective date of this act if any of the elements of the offense occurred prior thereto. Act of December 6, 1972, P.L. 1482, No. 334, §2. The failure to make required disposition took place in 1974 after appellees received the premium checks. The Crimes Code was then effective. With respect to territorial jurisdiction Crimes Code Section 102(a), 18 Pa.C.S. §102(a) provides, in relevant part:

> §102. Territorial applicability.
>
> (a) General rule.—Except as otherwise provided in this section, a person may be convicted under the law of this Commonwealth of an offense committed by his own conduct or the conduct of another for which he is legally accountable if either:
>
> (1) the conduct which is an element of the offense or the result which is such an element occurs within this Commonwealth;
>
> . . . .
>
> (5) the offense consists of the omission to perform a legal duty imposed by the law of this Commonwealth with respect to domicile, residence or a relationship to a person, thing or transaction in this Commonwealth;
>
> . . . .

Section 102 is similar to Section 103 of the Model Penal Code, discussed in Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 Case Western Res. L. Rev. 44, 60-61 (1974).

directed the jury to find appellees not guilty if it found New York civil law treated payment to the broker as payment to the insurance company.[6]

The issue of whether payment to a faithless agent is the same as payment to his principal, relevant in a civil action between the principal and a third party, is irrelevant to the determination of whether that faithless agent acted criminally in withholding funds due his principal. In finding this issue determinative of the Commonwealth's jurisdiction, Superior Court incorrectly separated the issue of jurisdiction from those "choice of law influencing considerations beyond due process" which some commentators believe should influence the question of jurisdiction in criminal cases.[7]

Both the Superior Court opinion and appellees' brief refer to this issue as a jurisdiction-related fact question. They then proceed, however, to treat it as a separate conflict of laws question on the propriety of requiring the jury to apply certain aspects of New York insurance law to this case in determining

6. The points for charge submitted by appellees, read in part to the jury, are as follows:

> Under the law, endorsement of a check by the proper person to make such endorsement constitutes an actual and legitimate payment of an obligation. *If you find from the evidence that either Defendant had the authorization of officers of The Market Facilities, Inc. to enforse said company's name on the checks of the Commonwealth and deposit them in the bank account of Charles W. Ohle, Inc., then you must find that payment was made to the insurance company, and you must find Defendants not guilty.* Under the Insurance Law of the State of New York when an insurance company entrusts its policies to a broker for delivery to the insured, the broker acts as an agent for the insurance company in collecting and receiving premiums, and payment to the broker is deemed payment to the insurance company. *Therefore, if you find that Defendants received payment of the insurance premium from the Commonwealth of Pennsylvania, you must find that the obligation of the Commonwealth of Pennsylvania was discharged, because payment to the broker was payment to the insurer. Any subsequent failure to transmit moneys to the insurance company would not constitute a violation of the criminal statute under which Defendants are charged.*

(The emphasized portions are those sections of the submitted jury charges *not* read by the trial court).

7. *See* Leflar, *supra*, note 5.

appellees' guilt. This analysis confuses the issue of the trial court's jurisdiction, *i.e.*, its power to hear and decide the case, with the conflicts principles arguably affecting that power.[8] In so doing, Superior Court misapplied the choice of law principles set forth by Professor Leflar, formerly Justice Leflar of the Arkansas Supreme Court, in Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 Case Western Res. L. Rev. 44 (1974). The Leflar article, cited by both appellees and the Commonwealth, criticizes the traditional territorial method of determining the applicable law in criminal cases and recommends instead use of certain "choice influencing" considerations suggested by the author. This choice influencing analysis goes beyond both the traditional territorial view of criminal jurisdiction and the analysis in terms of statutory construction employed in some jurisdictions. The latter two restrict jurisdiction only by due process considerations of fairness and contacts with the forum.

Whatever the analysis, jurisdiction to hear the case is the fundamental question to which conflict of laws "choice influencing" considerations are to be applied.[9] A finding that there is jurisdiction will result in the forum law's application "since the case will not be heard unless it is proposed to apply the forum's law to it." Leflar, *supra* p. 10, at 61-62. "Choice influencing" considerations will, if applicable, allow the court to appeal to the criminal, not civil law of another state which has an interest in the case. According to Leflar, three choice influencing

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8. Despite the confusion of terms in Superior Court's opinion and appellees' brief, the remand of the theft charges for a new trial indicates Superior Court concluded that Dauphin County Common Pleas had jurisdiction, and appellees do not now contest this determination. *See* Brief for Appellees at 8, where it is stated that "Superior Court correctly ordered a new trial. . . ."

9. Leflar, *supra*, at 62.

> The question of jurisdiction and of choice of law combine as one question — is the forum's substantive criminal law properly applicable to the facts? A preliminary part of the question is whether federal due process requirements would be satisfied if forum law were applied. If not, the question is answered. But if due process would be satisfied, the common law part of the question remains. That is when the choice-influencing considerations should be taken into account.

considerations are relevant in criminal cases. They are predictability of results, interstate orderliness in the law's administration and advancement of the forum's governmental interests. All three support the application of Pennsylvania law to this case. *See* Leflar, *supra*, at 61-65.

The wording offered by appellees would have improperly decided the underlying conflict of laws issue by requiring the jury to apply the civil law of New York in determining appellees' guilt, rather than the law of Pennsylvania. Appellees' submitted instructions would not only have made New York criminal law controlling in determining appellees' criminal liability in Pennsylvania, but would have made controlling the insurance law of New York and its attendant principles of agency determinative.

The trial court committed no error in refusing this instruction and thus applying the law of the forum, Pennsylvania. It is a basic proposition of conflict of laws in criminal cases that "the question of jurisdiction and that of governing substantive law always receive the same answer. The governing law is always that of the forum state, if the forum court has jurisdiction." *See* Leflar, *supra*, at 47.

Richards v. United States, 369 U.S. 1 (1962), cited by appellees, is not to the contrary. *Richards*, a civil case arising under the Federal Tort Claims Act, states that "where more than one state has sufficiently substantial contact with the activity in question, the forum state, . . . could constitutionally apply to the decision of the case the law of one or another state having such an interest." 369 U.S. at 15. It thus allows a court, consistent with the protection granted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, to apply the substantive law of another jurisdiction in certain cases. Such an application, however, is not mandated. Moreover, that substantive law must be the appropriate substantive law, in this case the criminal law of New York, not its insurance law. Appellees' argument, and the wording of their proffered instructions, would transform the agency principles of New York insurance law into criminal law principles binding in this Pennsylvania prosecution. Such a result is not justified under any conflict of laws analysis.

Appelles' agrument that their receipt of the premium checks as agents of Reserve Insurance Company constituted payment to Reserve is simply additional evidence of their persistent confusion of civil law agency principles with our criminal law of theft, and ignores the fact that the Commonwealth's motor fleet insurance policy was cancelled because of non-payment of premiums. Whether the Commonwealth suffered an actual loss from this cancellation is irrelevant. At the very least, appellees failed to perform their duty to transfer the premiums to Reserve, and thus also violated their legal duty under Pennsylvania law, a violation for which Pennsylvania imposes criminal sanctions. That violation substantially affected this Commonwealth's interests. It lost both the assured coverage and the defense against claims which the premium was intended to purchase. Indeed, when these charges were tried Pennsylvania was perforce litigating those issues in an action by the carrier to recover the premiums appellees had not remitted.[10]

Thus, the trial court, having jurisdiction, properly instructed the jury. It committed no error by instructing the jury on the substance of the defense put forward by appellees.

Moreover, the trial court correctly concluded appellees misstated New York insurance law. It said:

> The defendants rely upon the New York Insurance Law, §121, titled "Broker authorized to receive premium, when" and *Lezak v. National Grange Mutual Insurance Co.*, 233 N.Y.S. 2d 607 (Supreme Court 1962). The defendants contend Section 121 as interpreted by *Lazak* provides that payment to a broker, entrusted by the insurer with delivery of the policy to the insured, is deemed a completed payment

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10. The outcome of that action is not relevant to these charges. When Pennsylvania remitted the premiums to cover these risks it certainly did not expect either to be relegated to a law suit in order to establish coverage, or to defend one asking it to pay again. The Commonwealth fulfilled its duty by paying the premiums to the agents. The imposition of criminal sanctions for that violation of Pennsylvania law does not preclude the Commonwealth from asserting the defense of payment in a civil suit brought by Reserve for non-payment.

to the insurer because the broker acts as agent for the insurer. Thus, they argue, the final element in the theft would be absent, as the defendants would not have failed to make the required disposition of the property.

This theory is faulty. The brokers are merely agents authorized to receive the premium payments but with an obligation to transmit the money to the insurer, that is to make the required disposition of the property. The parties per the insurance contract expected the premiums (net the commission) to be finally received by the insurer not the broker. Since premiums due on a policy of insurance and paid to an insurance broker for transmission to an insurance company when received by the broker become trust funds, it is the obligation of the broker, in the faithful discharge of his duty to the insured, not to intermingle such moneys with his general funds not to divert, but to keep the money separate and distinct from his own property and promptly transmit to the insurance company. 29 N.Y. Jur. Insurance §463. *Leterman v. Pink*, 291 N.Y.S. 249, 254 (Supreme Court, App. Div. 1936). There is no evidence the New York legislature intended to negate the fiduciary duty of the brokers to relay the funds due to the insurer. Rather the New York legislature has codified the fiduciary capacity of the brokers for all premiums received. New York Insurance Law, §125. *See also* 11 N.Y.C.R.R. 20.3.

100 Dauph. at 101-102.

As defined by Section 3927 of our Crimes Code, theft by failure to make required disposition of funds received has four elements:[11]

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11. Section 3927 of the Crimes Code, 18 Pa.C.S. §3927, provides:
§3927. Theft by failure to make required disposition of funds received (a) Offense defined. — A person who obtains property upon agreement, or subject to a known legal obligation, to make specified payments or other disposition, whether from such property or its proceeds or from his own property to be reserved in equivalent amount, is guilty of theft if he intentionally deals with the property obtained as his own and fails to make

1. The obtaining of property of another;

2. Subject to an agreement or known legal obligation upon the receipt to make specified payments or other disposition thereof;

3. Intentional dealing with the property obtained as the defendant's own; and

4. Failure of the defendant to make the required disposition of the property.

Commonwealth v. Crafton, 240 Pa. Superior Ct. 12, 16, 367 A.2d 1092, 1094-1096 (1976). Appellees concede that the first two elements of the crime occurred in Pennsylvania and therefore the trial court possessed jurisdiction to hear and try the case. That jurisdiction, based on 18 Pa.C.S. §102(a)(1),[12] provides for conviction "under the laws of this Commonwealth" when the "conduct which is an element of the offense . . . [occurs] within this Commonwealth." Once it detemined that it had jurisdiction over the case the trial court correctly refused the instructions on

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NOTES *(Continued)*

the required payment or disposition. The foregoing applies notwithstanding that it may be impossible to identify particular property as belonging to the victim at the time of the failure of the actor to make the required payment or disposition.

(b) Presumptions. — An officer or employe of the government or of a financial institution is presumed:

(1) to know any legal obligation relevant to his criminal liability under this section; and

(2) to have dealt with the property as his own if he fails to pay or account upon lawful demand, or if an audit reveals a shortage or falsification of accounts.

12. The Commonwealth argued before Superior Court that the trial court's jurisdiction could also be based on 18 Pa.C.S. §102(a)(3). Superior Court rejected this argument, stating that it is "clear that subsection 3 was intended to reach outside the territorial limits of Pennsylvania to prosecute those who had a duty or obligation which must necessarily have been performed within our boundaries. . . ." 291 Pa. Superior Ct. at 126, 435 A.2d at 600. Because of our determination that §102(a)(1) is applicable, we need not decide this issue. We note, however, that the language of subsection 3 while referring to a "legal duty imposed by the law of this Commonwealth" makes no requirement that the duty be carried out within Pennsylvania.

New York civil law which appellees requested and simply asked the jury to determine whether appellees' actions involved all four of the elements Pennsylvania law requires before imposing criminal liability for the offense of theft by failure to make required disposition of funds received.

The trial court, after it determined it had jurisdiction, properly treated the issue as a question of whether the Commonwealth had proven all the substantive elements of the crime of theft.

In refusing parts of appellees' points for charge, the trial court also held that it had covered the substance of those points in other parts of its instructions to the jury. T.T. at 355-356 (June 1, 1977). We agree.

A trial court has broad discretion in phrasing its points for charge, and is not bound to give instructions in the form requested, particularly where that form does not reflect a correct interpretation of the law. *Commonwealth v. Holland*, 480 Pa. 202, 389 A.2d 1026 (1978). Moreover, a trial court need not accept counsel's wording, but may choose its own so long as the "area is adequately, accurately and clearly presented to the jury for their consideration." *Commonwealth v. McComb*, 462 Pa. 504, 509, 341 A.2d 496, 498 (1975). Finally, an appellate evaluation of the charge must be based on an examination of it as a whole to determine whether it was fair or prejudicial. *Commonwealth v. Wortham*, 471 Pa. 243, 369 A.2d 1287 (1977).

Applying these standards and reading the charge as a whole we believe that the court properly instructed the jury on all the relevant legal issues, including its jurisdiction and appellees' contention that the money was properly disposed of, at least insofar as the legal obligation between the brokers and the Commonwealth was concerned. The following excerpt from the court's instructions shows that the issues raised in the refused sections of appellees' proffered instructions were in fact presented to the jury, though not in the words supplied by appellees' counsel:

> Ladies and gentlemen, so much for the facts. We think that we have generally told you, in fact we think that we have

> specifically told you the basis for the defense. The defense says that the state did not lose anything; that the money was sent to the defendants — or, rather, the money was sent to Market Facilities and to Charles W. Ohle, Inc. in New York, that there was an endorsement that acknowledged receipt of the payment and, therefore, Reserve Insurance Company could have no claim against the Commonwealth of Pennsylvania, that if the Commonwealth did anything in the nature of the payments, the Commonwealth of Pennsylvania was acting under either a mistake or a misunderstanding.
>
> The defense asserts that no criminal act was done until the obligation to transmit the funds to the insurance company arose and was not met. Of course, it is their contention that this obligation did not arise until sometime after the money was received in New York, that up to that point nothing wrong was done, there was nothing wrong with Mr. Ram coming to Harrisburg and taking the money, that they had a right to use the money for 45 or 60 days, and if they were unable to pay that was purely a civil problem or civil action which should exist somewhere in either New York or some other state between the defendants and the Reserve Insurance Company. The Court is giving that to you for your consideration.

T.T. at 353-354 (June 1, 1977). The trial court did not refuse the substance, but only the wording of appellees' suggested charges, thus fully and accurately presenting these issues to the jury. *McComb, supra*.[13]

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13. The trial court's instructions also make clear that appellees' reliance on *Commonwealth v. Bighum*, 452 Pa. 554, 307 A.2d 255 (1973) and *Commonwealth v. Mull*, 316 Pa. 424, 175 A. 418 (1934) is misplaced. In *Mull* the trial court failed to instruct the jury on jurisdiction where it was very much in doubt that any element of the crime (murder) had occurred in the county. In *Bighum* the facts so overwhelmingly supported the jurisdiction of the trial court it was held not to be error for the trial court not to charge on the issue of jurisdiction.

IV

Appellee Ohle was also convicted of bribery and conspiracy to commit bribery as a result of the kickbacks involving Hilton and Trucco. As stated, Jackson suffered a mistrial on these charges. Superior Court not only reversed Ohle's convictions on these charges, but also quashed these indictments against him. Superior Court's threshhold determination that appellee could not have been properly convicted under the Crimes Code was plainly correct. Elements of both the bribery and conspiracy did occur before its effective date. Thus, conviction had to be under the Penal Code pursuant to the savings clause language contained in Crimes Code Section 2.[14] The indictment itself was unfortunately phrased in the language of the Crimes Code. It said:

> [O]n (or about) February, 1973, through September, 1974, in said County, one Charles W. Ohle did offer, agree to confer, and confer upon another any pecuniary benefit as consideration for the decision, opinion, recommendation or other exercise of discretion of a public servant by the recipient.
>
> Other person(s): Anthony J. Trucco and Frank J. Hilton.
>
> Public servant(s): Trucco: Director, Insurance Bureau, Pennsylvania Department of Property and Supplies.
>
> Hilton: Secretary of Property and Supplies, Commonwealth of Pennsylvania.
>
> Pecuniary benefit: $176,000
>
> Action: Did confer rebates and kickbacks to Pennsylvania officials (Hilton, Trucco) which represented a portion of premiums for insurance policies purchased by the Commonwealth of Pennsylvania to influence his selection as broker for said policies by Frank Hilton and Anthony Trucco.

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14. Act of December 6, 1972, *supra*, note 5.

However, that indictment included all the factual elements of the Penal Code offenses.[15]

The meeting between Trucco and Ohle in New York City, an act essential to both the bribery and conspiracy charges, occurred in February, 1973. This was prior to June 6, 1973, the effective date of the Crimes Code and thus invoked the savings clause in the Crimes Code, which provides:

> Section 2.
>
> Title 18 . . . as added by this act, does not apply to offenses committed prior to the effective date of this act and prosecutions for such offense shall be governed by the prior law,

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15. The Crimes Code provision dealing with bribery in official and political matters, 18 Pa.C.S. §4701, provides:

> (a) Offenses defined. — A person is guilty of bribery, . . . if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:
>
> (1) any pecuniary benefit as consideration for the decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter by the recipient;
>
> (2) any benefit as consideration for the decision, vote, recommendation or other exercise of official discretion by the recipient in a judicial, administrative or legislative proceeding; or
>
> (3) any benefit as consideration for a violation of a known legal duty as public servant or party official.
>
> (b) Defenses prohibited. — It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, had left office, or lacked jurisdiction, or for any other reason.

The Penal Code provision, 18 P.S. §4303, stated, in pertinent part:

> §4303. Bribery of Governmental officers and employees; judges, jurors, etc.
>
> Whoever shall directly or indirectly, or by means of and through any artful and dishonest device whatever, give or make any promise, contract or agreement, for the payment, delivery, or alienation of any money, goods or other thing, in order to obtain of influence the vote, opinion, verdict, award, judgment, decree, or behavior of any member of the General Assembly, or any officer of employe of this Commonwealth, or of any political subdivision thereof, or any judge, juror, justice, referee or arbitrator, in any bill, action, suit, complaint, indictment, controversy, matter or thing whatsoever, depending or which shall depend before him or them, is guilty of bribery, . . .

> which is continued in effect for that purpose, as if this act were not in force. *For the purposes of this section, an offense was committed prior to the effective date of this act if any of the elements of the offense occurred prior thereto.*

Emphasis added. Appellees' criminal responsibility must, therefore, be determined under the Penal Code. Appellees point out that the Penal Code arguably contains an affirmative defense of impossibility to the crimes of bribery and conspiracy to commit it, absent in the Crimes Code. *See* Crimes Code §4701(b), note 15, *supra*, relating specifically to this offense, and generally *Commonwealth* v. *Henley*, ____Pa. Superior Ct. ____, 459 A.2d 365 (1983) (allocatur granted September 27, 1983) (holding that Section 901(b) of the Crimes Code, 42 Pa.C.S. §901(b), abrogates the defense of legal impossibility for all crimes).

Appellees' argument, that the affirmative defense of impossibility would have been available to him under the Penal Code, but was overlooked because of the misleading use of Crimes Code language in the indictment, has no merit. The facts do not lend themselves to this defense under either statute. Section 4304 of the Penal Code,[16] abolished by Section 4701(b) of the Crimes Code, 18 Pa.C.S. §4701(b), provided that the act for which the bribe is given must be one which the offeree had power to perform or influence. Although Superior Court's analysis of this issue is not totally clear, the offeree's lack of official power to accomplish the desired result is a variant of the impossibility defense. Neither this variant, nor the kind of impossibility which arises when the act the offeror assumes is prohibited is not illegal, has any application here. Hilton had

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16. 18 P.S. §4304 provided, in relevant part:

§4304. Corrupt solicitation

Whoever, directly or indirectly, by offer or promise of money, office, appointment, employment, testimonial or other thing of value, or by threats or intimidation, endeavors to influence any member of the General Assembly, State, county, election, municipal or other public officer, in the discharge, performance, or nonperformance of any act, duty or obligation pertaining to such office, is guilty of corrupt solicitation, a misdemeanor.

. . . .

power to award the insurance contract. His award of it in consideration of private gain was plainly illegal. Factual impossibility is not an available defense under the Crimes Code or the Penal Code. This exhausts the available affirmative defenses. Thus, no impossibility defense could have succeeded; and, indeed, it is hard to see how its assertion would reasonably have advanced appellee Ohle's interest.

There is no evidence that appellee attempted to use the defense, or that he would have been precluded from invoking it had he attempted it.[17] We will not therefore approve quashing these indictments merely because an inapplicable defense is arguably precluded by that indictment.

Moreover, although the indictment was technically defective, Superior Court acted incorrectly in freezing it into its original language, without allowing any variance, despite the provisions of Pa.R.Crim.P. 213,[18] particularly since appellees were charged alternatively under both the Crimes Code and the Penal Code in the initial criminal complaint. Moreover, the trial court required the jury to find all the elements set forth in the Penal Code. Thus appellees were fully apprised of the potential application of the Penal Code to the bribery and conspiracy charges. They were on notice of any issues arising under it and could have been prepared to utilize any defense available. It is

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17. Appellees' motion to quash these indictments makes no reference to any "affirmative defense" available under the Penal Code, although it plainly states the indictment should have been framed under it.

18. Pa.R.Crim.P. 213 provides in relevant part:

(a) An indictment . . . shall be valid and sufficient in law if it contains:

. . . .

(5) *a plain and concise statement of the essential elements of the offense substantially the same as or cognate to the offense alleged in the complaint;*

. . . .

(b) The indictment shall contain the official or customary citation of the statute and section thereof or other provision of law which the defendant is alleged therein to have violated; but the omission of or error in such citation shall not affect the validity or sufficiency of the indictment.

. . . .

Emphasis added.

difficult to believe that experienced criminal defense counsel would have overlooked the defense of impossibility as it had traditionally existed in this Commonwealth, despite the differences in this respect between the Penal Code and the Crimes Code, especially considering the extensive commentary on that subject in the literature if it had had any application to these facts. Indeed, the extent to which impossibility is available as a defense under the Crimes Code is not yet settled. *See Commonwealth v. Henley, supra*. The more likely explanation is counsel's recognition that an impossibility defense was unavailable on these facts, a recognition this Court shares, as discussed above.

The absense of a citation to the Penal Code in the indictment is not a fatal variance under Pa.R.Crim.P. 213(b). The criminal complaint cited both the Crimes Code and the Penal Code. Moreover, the Commonwealth did provide appellee with "a plain and concise statement of the essential elements of the offense substantially the same as or cognate to the offense alleged in the complaint," as required by Pa.R.Crim.P. 213(a), albeit in the language of the Crimes Code. Whatever the technical differences, the offenses of bribery and conspiracy under the Penal Code are "similar" or "cognate" to those offenses under the Crimes Code. Thus, appellees had notice of the charges sufficient to permit preparation of a defense, the purpose of Rule 213.

Our position in this respect is consistent not only with our rule of criminal procedure, but also with the standards set by our case law for determining an indictment's sufficiency. "Indictments must be read in a common sense manner and are not to be construed in an overly technical sense." *Commonwealth v. Pope*, 455 Pa. 384, 390, 317 A.2d 887, 890 (1974). *See also United States v. Schoenhut*, 576 F.2d 1010 (3d. Cir. 1978), *cert. denied*, 439 U.S. 964. The purpose of the indictment is "to provide the accused with sufficient notice to prepare a defense, and to insure that he will not be tried twice for the same act." *Commonwealth v. Rolinski*, 267 Pa. Superior Ct. 199, 202, 406 A.2d 763, 764 (1979). *See also Commonwealth v. Ackerman*, 239 Pa. Superior Ct. 187, 361 A.2d 746 (1976). Furthermore, a variance is not fatal unless it "could mislead the defendant at trial, involves an element of surprise prejudicial to the defendant's efforts to prepare

his defense, precludes the defendant from anticipating the prosecution's proof or impairs a substantial right." *Commonwealth v. Pope*, 455 Pa. at 391, 317 A.2d at 890 (footnotes omitted).

Under the facts of this case, the bribery and conspiracy indictments meet these standards. The variances were not "fatal." Appellees knew, or should have known, what crimes they were charged with and what the Commonwealth would be required to prove. They should not have been surprised or prejudiced. Indeed, the trial court's instruction to the jury that appellee Ohle would have to be found guilty under both the Penal Code and Crimes Code provisions arguably gave him more than he was entitled to. On this point the trial court charged:

> However, the Commonwealth claims that even though this indictment has been written to conform with the statute which came into effect in June of 1973, nevertheless, these acts which occurred were violations of the law whether it be under the Act which took effect in 1973 or under the prior penal code. So, I'm going to read both of these statutes to you, because in order to find Mr. Ohle guilty of the crime you must find that he violated the law as to bribery not only in connection with the one act—the one that is the basis for the indictment, but also that he violated the law as it existed prior to June 6, 1973. So, I'm going to read both of these Acts to you because they are both for your consideration and it is necessary for you, when you apply the facts to the law, to be able to determine that Mr. Ohle has either violated both Acts or has not.
>
> If he has not, then of course he would be innocent of the charge of bribery.

T.T. at 232 (December 13, 1978). We believe this instruction cured any lingering effect which may have resulted from the variance between the complaint and the indictment.

V

For these reasons we vacate the orders of Superior Court which granted appellees Ohle and Jackson a new trial on the charges of theft by failure to make required disposition of funds, as well as the order which reversed appellee Ohle's conviction for bribery and conspiracy and quashed the indictment against him on those charges. However, because its disposition did not require Superior Court to consider other trial errors appellees asserted, we remand the records to it for further consideration of those other issues.[19]

Mr. Justice Nix did not participate in the consideration or decision of this case.

Mr. Chief Justice Roberts and Mr. Justice McDermott concur in the result.

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19. *See supra*, note 3.

APPENDIX E

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
v.	:	
	:	No. 103 March Term, 1978
RONALD J. JACKSON Appellant	:	

Appeal from the Judgment of Sentence of the Court of Common Pleas, Dauphin County, Criminal Division, at No. 1179 Criminal Division, 1975.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
v.	:	
	:	No. 106 March Term, 1978
CHARLES W. OHLE, Appellant	:	

Appeal from the Judgment of Sentence of the Court of Common Pleas, Dauphin County, Criminal Division, at Nos. 1171, 1173, 1174 Criminal Division, 1975.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	No. 119 March Term, 1979
CHARLES W. OHLE, Appellant	:	

Appeal from the Order of Court of the Court of Common Pleas, Criminal Division, Dauphin County, at Nos. 1171 and 1173 Criminal Division 1975.

Before: CERCONE, P.J., WATKINS, and MONTGOMERY, JJ.

OPINION BY CERCONE, P.J.:

Appellants Ohle and Jackson were charged with theft by failure to make required disposition of funds received,[1] bribery in official and political matters,[2] and conspiracy to commit bribery.[3] In June of 1977 Ohle and Jackson were tried jointly on the theft charges. The Commonwealth won convictions on those charges against both men. Each was subsequently sentenced to the payment of a fine of $1,000 plus the costs of his prosecution, restitution to the Commonwealth of $304,500.00, and to a term of imprisonment of from three to five years. Ohle has appealed the judgment of sentence against him at No. 106 March Term, 1978. Jackson has appealed the judgment of sentence against him at No. 103 March Term, 1978.

On the conspiracy and bribery charges a joint trial was begun November 15, 1977. Jackson became ill during this trial, was ruled unable to continue, and a mistrial motion was granted in his favor. As to Ohle, however, the trial continued. He was convicted on both the conspiracy and the bribery counts. For the conspiracy conviction the court sentenced Ohle to payment of a fine and a term of imprisonment of from one to two years, to run concurrently with the prison sentence imposed in the theft case. On the bribery conviction the court imposed on Ohle a sentence of six to twelve months imprisonment, which was also to run concurrently with the other prison sentences imposed for the theft and conspiracy convictions, and it also imposed a fine of $500. He has appealed from the convictions on the conspiracy and bribery charges.

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1. 18 Pa.C.S. §3927.
2. 18 Pa.C.S. §4701.
3. 18 Pa.C.S. §903.

"C"

Opinion and Order of the Superior Court dated September 25, 1981 reported at 435 A.2d 592 (1981).

Because these three appeals, two by Ohle and one by Jackson, are based generally on the same facts, they were consolidated for purposes of briefing and argument. For convenience sake, we have set out the facts in a single narrative. However, we discuss the legal issues presented separately.

I.

Appellants Ohle and Jackson were insurance brokers with both the firms of Charles W. Ohle Inc. and O. & R. Excess, Inc., which were brokerages licensed to do business in New York. Charles W. Ohle Inc., was licensed to do business in Pennsylvania as well. Prior to June 30, 1972 Anthony J. Trucco, then Director of the Commonwealth's Bureau of Insurance and acting pursuant to a plan developed by Frank C. Hilton, then the Commonwealth's Secretary of Property and Supplies, arranged for the renegotiation of the insurance policy covering the Commonwealth's 26,000 automobile fleet. The policy was renegotiated because Trucco and Hilton saw in it a likely opportunity to provide them with an illegal source of revenue through the appointment of a broker who would provide them with a kickback from part of the broker's commission. In February of 1973 Trucco met appellants and discussed the kickback scheme. He told them that the appointment could only be made by Hilton but that he would recommend them to Hilton. He did not reveal Hilton's connection with the scheme. Appellants agreed to the kickback scheme as outlined to them by Trucco. Later that month Hilton appointed appellants' firm, Charles W. Ohle, Inc., broker of record on the renegotiated automobile insurance policy.

The first premium payment in question was delivered to an agent of appellants' in Harrisburg on July 25, 1974 and transported to New York. It was in the form of a check in the sum of $500,000 and made payable to Charles W. Ohle, Inc. and Market Facilities, Inc. (Market Facilities, Inc. was an affiliate of the insurance company which actually carried the policy.) An officer of the insurance company purportedly gave appellant Ohle authority to endorse the Commonwealth's premium checks for Market

Facilities. This first check of $500,000 was endorsed by Ohle pursuant to this purported authority, and by his firm, and deposited in a firm account. A second check in the amount of $300,000 was delivered to an agent of appellants in Harrisburg and transported to New York on August 5, 1974. It too was endorsed by Ohle pursuant to the same authority, and by his firm, and deposited in a firm account. Rather than turning the premiums less broker's commission immediately over to the insurance company the $800,000 was used by appellants as collateral on a short term loan from a Florida bank. For unexplained reasons appellants defaulted on the Florida loan and the bank seized the collateral. The $800,000 never reached the insurance company's coffers and it eventually cancelled Pennsylvania's automobile fleet insurance policy.

Shortly after the cancellation of the insurance policy an article appeared in a Harrisburg newspaper concerning a claim by one Mr. Devine, a former employee of Ohle, that he had knowledge of a bribery scheme between Ohle and Jackson on one side and Hilton and Trucco on the other. On the same day, an FBI agent visited the offices of the Commonwealth's Department of Justice and notified state authorities of the federal investigation. Acting upon this information, Edward Golla, Chief Investigator for the Pennsylvania Department of Justice began an investigation. Soon Golla had in his possession statements by Noel Bernard, an employee of the insurance company, pertaining to the theft, bribery and conspiracy charges, as well as statements by other Commonwealth employees concerning appellants' participation in the scheme. Subsequently, appellants were granted use immunity pursuant to the federal statutes by the U. S. District Court for the Middle District of Pennsylvania. *See* 18 U.S.C. §6002. The Commonwealth's investigation continued; investigators received statements by Trucco which further implicated appellants in the bribery and conspiracy scheme. The appellants thereupon entered into a plea bargain with the district attorney of Dauphin County. On the basis of the plea bargain appellants waived their extradition and were arraigned on the charges brought against them. Appellants later gave statements to the district attorney and in federal court at the trial of Frank

C. Hilton, former Secretary of the Department of Property and Supplies. Subsequent thereto the grand jury of Dauphin County approved Bills of Indictment against them. Thereafter the district attorney notified appellants of his decision to withdraw the plea bargain and to prosecute them fully. Appellants made divers and diverse pre-trial motions, among which was a motion to quash the indictments because they were allegedly based on information gained as part of the withdrawn plea bargain. The court held that the evidence presented to the grand jury had been independently gathered and therefore refused to quash the indictments. Trials on the various charges were held in June and October of 1977, which resulted in the convictions of appellants as above set out. These appeals followed.

II.

Appellants have assigned numerous errors. Because of the disposition we make today of these cases, we need not consider all the questions raised.[4]

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4. Appellants' brief lists the following questions on appeal:

1. Did the Court of Common Pleas, Dauphin County, have jurisdiction since the crime of Theft, if committed, occurred in the State of New York?

2. Did the authorized endorsement of premium checks by the payee insurance company constitute payment to the insurance company?

3. Did the Court err in refusing to grant a mistrial after revealing its decision on Appellants' demurrer to the news media, which decision was published and read and heard by several jurors?

4. Did the Court err in not suppressing Appellants' statements and records made pursuant to a written Plea Bargain which was subsequently unilaterally withdrawn by the Commonwealth?

5. Did the Court err in refusing to dismiss the prosecution because Appellants were charged under the Crimes Code rather than the Penal Code?

*6. Did the Court err in refusing to dismiss the charge of Conspiracy on grounds of merger?

*7. Did the Court err in refusing to dismiss the prosecution since only uncorroborated testimony of accomplices was introduced?

*8. Did the Court err in denying Appellant's Motion for Mistrial on

A.

We address first the question of whether the court erred in refusing to quash the indictments. Appellants both contend that the indictments on all the counts should have been quashed because they contain substantive defects.[5] They argue that they were improperly indicted under the Crimes Code and that they should have been indicted under the Penal Code. They argue further that the indictments were in violation of Section 2 of the Act of December 6, 1972, P.L. ____, No. 334, and that because violation of the Act of 1972 constitutes a substantive defect the indictments ought to have been quashed. Section 1 of the Act of December 6, 1972 amended Title 18 of the Pennsylvania Consolidated Statutes creating the Crimes Code of Pennsylvania. Section 2 of the Act is a savings clause which ensured the vitality of the Penal Code, and required prosecution under its provision of any crimes the elements of which arose before the Act's effective date. Section 2 of the Act reads:

> Title 18 of the Consolidated Pennsylvania Statutes (relating to crimes and offenses), as added by this act, does not apply to offenses committed prior to the effective date of this act and prosecutions for such offenses shall be governed by the prior law, which is continued in effect for that purpose, as if this act were not in force. For the purposes of this section, an offense was committed prior to the effective date of this act if any of the elements of the offense occurred prior thereto.

Act of Dec. 6, 1972, P.L. ____, No. 334, §2. Appellants contend that elements of the crimes of theft, bribery and conspiracy, of which they have been variously convicted, arose prior to the June 6, 1973 effective date of the Crimes Code. We begin by

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the basis of Commonwealth witness's unresponsive reference to Appellant's prior criminal record?

*These questions pertain to appellant Ohle alone.

5. These arguments were made at all relevant stages of these proceedings and are thus preserved for our review.

considering the indictments against Ohle on the bribery and conspiracy charges of which he was ultimately convicted,[6] and then we shall consider the indictments against both Ohle and Jackson on the charges of theft by failure to make required disposition of funds received.

1.

Ohle contends that it was error to have refused to quash the indictments against him alleging violations of Crimes Code Sections 4701 (bribery) and 903 (conspiracy). His argument is based on the contention that elements of the alleged crimes arose prior to the effective date of the Crimes Code, and consequently that the indictments against him were faulty for their failure to allege violations under the Penal Code of 1968 rather than under the dictates of the Crimes Code of 1972. We agree and accordingly vacate the judgment of sentence relating to charges of bribery and conspiracy, reserve the conviction and quash the indictment against him.

Pennsylvania Crimes Code Section 4701 reads:

BRIBERY IN OFFICIAL AND POLITICAL MATTERS

(a) Offenses defined. — A person is guilty of bribery, a felony of the third degree, if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

(1) any pecuniary benefit as consideration for the decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter by the recipient;

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6. We do not express any opinion whatsoever concerning the propriety of the indictments brought against Jackson on charges of conspiracy and bribery. The Commonwealth's case against him on those charges resulted in a mistrial; there has been no appeal by Jackson on the order denying the motion to quash the indictments on those charges.

(2) any benefit as consideration for the decision, vote, recommendation or other exercise of official discretion by the recipient in a judicial, administrative or legislative proceeding; or

(3) any benefit as consideration for a violation of a known legal duty as public servant or party official.

(b) Defenses prohibited. — It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, had left office, or lacked jurisdiction, or for any other reason.

18 Pa.C.S. §4701. Once the offer to confer the proscribed benefit, or once the agreement is made, the crime is complete. There need be no waiting for the benefit actually to be conferred. *Cf. United States v. Davis*, 576 F.2d 1065 (3rd. Cir., 1978), *cert. denied*, 439 U.S. 836, 99 S.Ct. 119, 58 L.Ed. 2d 132 (1978). Instantly, it is clear from the indictment itself, as well as from the evidence at trial, that the agreement to confer the proscribed benefit upon Trucco was reached no later than February of 1973, fully five months before the June 16, 1973 effective date of the Crimes Code provision. *See* Act of December 6, 1972, *supra*.

The Commonwealth argues that the elements of the offense prohibited by the Crimes Code and elements of the corresponding Penal Code offense are identical, and that therefore there was no defect, either informal or substantive, and hence that there arose neither the necessity of amending the indictment nor reason to quash it. We disagree. Section 4303 of the Penal Code reads in pertinent part:

Bribery of Government officers and employees; judges, jurors, etc.

Whoever shall directly or indirectly, or by means of and through any artful and dishonest device whatever, give or make any promise, contract or agreement, for the payment, delivery, or alienation of any money, goods or other thing, in order to obtain or influence the vote, opinion, verdict,

> award, judgment, decree, or behavior of any member of the General Assembly, or any officer or employee of this Commonwealth, or of any political subdivision thereof, or any judge, juror, justice, referee or arbitrator, *in any bill, action, suit, complaint, indictment, controversy, matter or thing whatsoever, depending or which shall depend before him or them*, is guilty of bribery, a misdemeanor, and on conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars ($500), or to undergo imprisonment by separate of solitary confinement at labor not exceeding one (1) year or both.

18 P.S. §4303. (Emphasis added). The Penal Code provision permits an affirmative defense: in order for culpability to exist, the action sought to be influenced by the offeror of the bribe must be one which the offeree of the bribe could affect. The potential for an affirmative defense under Penal Code Section 4304 undeniably distinguishes it from Crimes Code Section 4701. The Commonwealth's failure to indict Ohle under the Penal Code clearly constituted a defect in the indictment. The prejudice which arises out of a defect in the indictment which denies a potential defense against the charges cannot be gainsaid.[7] Thus, it was error not to have quashed the bribery indictment. Likewise, since the conspiracy indictment is based on the same facts, and was brought under Crimes Code Section 903 and not under the Penal Code, it too should have been quashed and it was error not to do so.

2.

Ohle and Jackson were convicted of violating Crimes Code Section 3927 (theft for failure to make required disposition of funds received). Section 3927(a) reads:

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7. Because the motion to quash was made pre-trial, an informal defect in the indictment could have been cured upon the proper motion, but the Commonwealth made no such motion. As for the propriety of amending a substantive defect in an indictment *see* Pa.R.Crim.P. 220; *and see Commonwealth v. Thomas*, ___Pa. Superior Ct. ___, 419 A.2d 1344 (1980); *Commonwealth v. Jones*, 250 Pa. Superior Ct. 471, 378 A.2d 1245 (1977).

> (a) Offense defined.—A person who obtains property upon agreement, or subject to a known legal obligation, to make specified payments or other dispositions, whether from such property or its proceeds or from his own property to be reserved in equivalent amount, is guilty of theft if he intentionally deals with the property obtained as his own and fails to make the required payment or disposition. The foregoing applies notwithstanding that it may be impossible to identify particular property as belonging to the victim at the time of the failure of the actor to make the required payment or disposition.

18 Pa.C.S. §3927(a). This Court first considered Section 3927 in *Commonwealth v. Crafton*, 240 Pa. Superior Ct. 12, 367 A.2d 1092 (1976). In *Crafton* we outlined the elements of the crime which is theft by failure to make required distribution of funds received. The elements of the crime, as we stated them there are:

> "1. The obtaining of property of another;
>
> 2. Subject to an agreement of known legal obligation upon the receipt to make specified payments or other disposition thereof;
>
> 3. Intentional dealing with the property obtained as the defendant's own; and
>
> 4. Failure of the defendant to make the required disposition of the property."

Id. at 16, 367 A.2d at 1094-96. *And see Commonwealth v. Austin*, 258 Pa. Superior Ct. 461, 466, 393 A.2d 36, 38 (1978).

Appellants do not deny that they received the property of another; they fully acknowledge receipt of the premiums paid by the Commonwealth. Rather, their attack on the validity of the indictment charging them with the crime of theft by failure to make required disposition of funds received, as proscribed under Section 3927, goes to the second element of the offense: "subject to agreement or known legal obligation." Appellants contend

that the legal obligation which made out this element of the offense is the agreement whereby they became brokers of record on the automobile fleet insurance policy. In this they are correct. However, they also contend that since the agreement arose prior to June 6, 1973, and since it is an element of the offense, then they should have been charged under a provision of the Penal Code and not under Section 3927 of the Crimes Code. Although the argument is persuasive we cannot accept it. Logically, the occurrence which triggers the applicability of Section 3927 is not the initiating of a legal obligation, but rather, the receipt of the property of another pursuant to that obligation. Although the legal obligation must necessarily be pre-existing or co-eval, with the receipt of the other party's property, logically, no element of the crime could be said to arise until the property has exchanged hands pursuant to the agreement creating the obligation. Thus, in considering the time the crime began, that is, in order to determine whether prosecution under Section 3927 was proper, we must logically read the first two elements of the crime as delineated in *Commonwealth v. Crafton* as one element. Therefore, as regards the application of Section 2 of the Act of December 6, 1972 to Section 3927 of the Crimes Code there should be only three elements to consider:

> 1. obtaining property of another upon agreement or known legal obligation to make specified payment or other disposition;
>
> 2. intentional dealing with the property as one's own; and
>
> 3. failure to make the required disposition of the property.

Any other reading of said Section 3927 of the Crimes Code, as Section 2 of the Act of 1972 applies to it, would give a vitality and

longevity to the Penal Code which the Legislature cannot rationally have intended.[8]

Appellants received the premium payments on July 25 and August 5, 1974. Receipt was made subject to a known legal obligation. As thus interpreted, no element of the offense arose prior to the effective date of the Crimes Code. Appellants were properly indicated under 18 Pa.C.S. §3927 and thus there was no error in refusing to quash the indictments, at least insofar as the time element is concerned.

B.

Appellants next assert that it was error not to have suppressed certain evidence. They contend this evidence came into the hands of the Commonwealth solely as a result of their cooperation with the Dauphin County District Attorney pursuant to the plea bargain agreement entered into April 26, 1975 and dishonored by the District Attorney January 13, 1976 for appellants alleged noncompliance with its terms. Although they have contended that this evidence should have been suppressed as to both the bribery and conspiracy indictments and the indictments for the theft for failure to make required disposition of funds received, our quashing of the bribery and conspiracy indictment against Ohle has obviated the need to consider the suppression question in regard to that indictment. Our discussion of this question thus applies only to the theft indictments.

As appellants have framed their question, we are asked to consider whether the suppression court erred in finding that the Commonwealth presented sufficient evidence to establish that the evidence presented to the Grand Jury, and later to the petit juries at trial, was restricted to the evidence placed under seal of court April 1, 1975, and contained nothing obtained subsequent to the plea bargain agreement.[9]

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8. If we were to accept appellant's argument then the failure to dispose of another's property thirty years after the legal duty was created could still be prosecuted under the Penal Code if the agreement creating the duty so to do arose prior to the effective date of the Crimes Code.

9. For the exact wording of the questions presented see footnote 4, question 4.

In suppression hearings the Commonwealth bears both the burden of going forward with the evidence, *Commonwealth ex rel. Butler v. Rundle*, 429 Pa. 141, 239 A.2d 426 (1968), *and see* Pa.R.Crim.P. 323(h), as well as the burden of persuasion, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), *and see Commonwealth ex rel. Butler v. Rundle, supra*. The standard by which we measure sufficiency of the evidence in suppression hearings is that of preponderance of the evidence. *Commonwealth ex rel. Butler v. Rundle, supra*. It is clear from the record of the suppression hearing that the Commonwealth met its burden by a preponderance of the evidence. There was no error in refusing to suppress evidence because it was clearly established that it was properly obtained and untainted.[10]

C.

The last question we address pertains solely to Ohle and Jackson's convictions for theft. The question raised is jurisdiction, and the assertion made is that if a crime occurred it occurred in New York and not in Pennsylvania, and that therefore the courts of the Commonwealth have no jurisdiction to try the case.

The common law rule of subject matter jurisdiction in criminal matters was that a prosecution could not be brought unless

10. Because of the way in which appellants have framed the question on appeal we need not consider the propriety of the District Attorney's action in withdrawing the plea bargaining agreement. However we note with interest the following:

> On the merits, our view is that in a plea bargain the government's obligation to make a recommendation arises only if defendant performs his obligation (in this instance, full disclosure), but the question whether defendant did in fact fail to perform the condition percedent is an issue not to be finally determined unilaterally by the government, but only on the basis of adequate evidence by the Court . . . There would be manifest impropriety in permitting the government, without satisfying a judge that the evidence provides that a defendant broke his promise, to escape from the obligation the government undertook in the plea bargain.

United States v. Simmons, 537 F.2d 1260, 1261 (4th Cir. 1976).

the "gist" of the offense occurred within the prosecuting jurisdiction. *See* Comment to Section 1.03, Model Penal Code, T.D. 5, (from which 18 Pa.C.S. §102 is derived). Often, as in the case of common law larceny, legal fictions were created which altered the essential elements of the offense to permit prosecution in the county where the defendant was apprehended instead of where the crime actually occurred. The courts of this Commonwealth long ago rejected the notion that these legal fictions, or non-essential elements of the offense, could give rise to subject matter jurisdiction in our courts where the essential elements of the crime occurred in another state *Commonwealth v. Simmons*, 5 Binn. 617 (1813) (one who steals goods in another state and brings them into this one cannot be found guilty of larceny, although one might be found guilty of bringing stolen goods into this state if statute so provided). We recently had occasion to discuss much the same question in *Commonwealth v. Bertels*, 260 Pa. Superior Ct. 496, 394 A.2d 1036 (1978), *aff'd* 491 Pa. 189, 420 A.2d 405 (1980). There we quoted from the authorities on the question of subject matter jurisdiction in criminal cases:

> In many cases requisite elements of the completed crime may be committed in different jurisdictions, and in such cases any state in which an essential part of the crime is committed may take jurisdiction. *It is necessary, however, to discriminate with great care between acts essential to the crime and acts merely incidental thereto*. For example, the mere forwarding of money from one state to another for the purchase of futures, for wagering on a horse race, or for any similar transaction forbidden by the laws of the former state, does not constitute a crime punishable therein, although it is otherwise if the statute makes the forwarding of the money, and not merely the transacton itself, a crime. 4*Wharton's Criminal Law and Procedure* §1507 at 88 (1957) (emphasis supplied; footnotes omitted).

Id. at 502, 394 A.2d at 1039. *See also* 21 Am.Jur. 2d, Criminal Law §385.

1.

Jurisdiction in Criminal Matters.

The territorial applicability of the Pennsylvania Crimes Code is set out in Section 102; the section defines the territorial scope of the Crimes Code and delimits the exercise of subject matter jurisdiction in criminal matters by our courts. As that section relates to the prosecution of appellants under Crimes Code Section 3927 the Commonwealth argues the following provisions are pertinent:

> §102. Territorial applicability
>
> (a) General rule.—Except as otherwise provided in this section, a person may be convicted under the law of this Commonwealth of an offense committed by his own conduct or the conduct of another for which he is legally accountable if either:
>
> > (1) the conduct which is an element of the offense or the result which is such an element occurs within this Commonwealth;
> >
> > * * *
> >
> > (5) the offense consists of the omission to perform a legal duty imposed by the law of this Commonwealth with respect to domicile, residence or a relationship to a person, thing or transaction in this Commonwealth; . . .

18 Pa.C.S. §102(a)(1) & (5). We may eliminate Section 102(a)(5) as a potential basis for the exercise of jurisdiction since it is clear that subsection 5 was intended to reach outside the territorial limits of Pennsylvania to prosecute those who had a duty or obligation which must necessarily have been performed within our boundaries and failed to do so. *See* Comment to Section 1.03, Model Penal Code, T.D.5, pp. 7-8; *see also* S. Toll, *Pennsylvania*

Crimes Code Annotated, §102 at 6 (1974).[11] The remaining statutory basis for the exercise of jurisdiction in this case is Section 102(a)(1) which provides for subject matter jurisdiction where an element of the proscribed activity occurs within the Commonwealth. The essential elements of the offense prohibited by Section 3927 are: 1) receipt of another's property, 2) subject to agreement or known legal obligation, 3) the intentional dealing with the property as the recipients own, 4) and failure to make disposition of the property required by the agreement or legal obligation. See *Commonwealth v. Crafton*, *supra*.[12]

Appellants argue that the first two elements are merely incidental to the crime charge. Their argument is two-pronged. First, they argue that the exercise of jurisdiction under Section 102 requires that some "element of [the] offense" have occurred in Pennsylvania, that "element of an offense" is defined in Crimes Code Section 103 as "conduct or attendant circumstances," that Section 103 defines "conduct" as "an action or omission and its acompanying state of mind," and that since Section 3927, *supra*, makes no requirement concerning the accompanying state of mind at the time of receipt of the property then receipt cannot constitute an "element of [the] offense" such that subject matter jurisdiction will attach. The argument cannot succeed; Section 3927 specifically requires that receipt of the property be accompanied with knowledge of an agreement or legal obligation to dispose of the property in a certain fashion. Secondly, appellants argue that since the receipt of the premium payments and the underlying brokerage agreement were legal

11. For an excellent example of the type of criminal statute to which 18 Pa.C.S. §102(a)(5) would be applicable compare Pennsylvania's criminal non-support statute, 18 Pa.C.S. §4322 with Georgia's, Ga. Code Ann. §74-9902, which makes the misdemeanor of abandonment of one's child a felony if the parent leaves the state. *Cf. Jones v. Helms*, ____U.S. ____, 49 Law Week 4692 (filed June 15, 1981), (the distinction between abandonment of child and abandonment of child coupled with absconding from the jurisdiction does not violate the equal Protection clause). *And cf. Commonweatlh v. Klimen*, 10 D & C 3d 256 (1979) (in personam jurisdiction over out-of-state father permissible, but denies jurisdiction on basis of forum non conveniens.)

12. *Cf.* our construction of the statute's elements for purposes of determining the applicability of the Crimes Code or Penal Code, *infra*.

they cannot constitute essential elements of the offense, even though "included in the description of the forbidden conduct in the definition of the offense" ("element of an offense," 18 Pa.C.S. §103) but are merely incidental thereto. This argument ignores the fact that legal receipt or possession of another's property has always been an essential element of crimes in the nature of conversion and embezzlement. Therefore, we conclude that the lower court did not err in refusing to dismiss the indictments for lack of jurisdiction.

2.

Jurisdiction as Question of Fact.

We next consider the correctness of the trial courts rulings on the submitted points for charge. This question also addresses the jurisdiction of the court.

"It is, of course, the law that 'the locus of a crime is always in issue, for the court has no jurisdiction of the offense unless it occurred within the county of trial. . . .' " *Commonwealth ex rel. Chatary v. Nailon*, 416 Pa. 280, 283, 206 A.2d 43, 45 (1965) quoting from *Commonwealth v. Mull*, 316 Pa. 424, 426, 175 A.2d 418, 419 (1934) Normally, the question is one of law and left to the trial judge to decide, but on rare occasions jurisdiction depends on the resolution of disputed facts. In those cases the question should be put to the jury upon proper instructions and failure to give such proper instructions may constitute reversible error. *Commonwealth v. Mull, id.*; *Commonwealth v. Bighum*, 452 Pa. 554, 307 A.2d 255 (1973).

Instantly, there were questions of fact in dispute which would have solved the jurisdictional riddle if the court had properly put them to the jury. The primary fact in dispute was, of course, whether appellants had discharged their obligation to the Commonwealth in accordance with the law. The determination of that question required first the determination of several lesser questions: in what capacity did appellants receive the insurance premiums; in what capacity did they endorse the checks; in what capacity did they deposit the monies in their account; in what capacity did they later remove the funds. Had all of this occurred

in Pennsylvania there would be no problem: the standards by which appellants' actions would be measured would be the standards set up by the law of Pennsylvania. However, much of the alleged criminal activity occurred in New York and not in Pennsylvania. Although the premium checks were written in Pennsylvania by the Commonwealth, the broker, the insurance companies, and the bank into which the checks were deposited were all out of state. Most of these lesser questions revolve around appellants' legal status vis-a-vis the New York insurance companies. It was necessary that their status in this regard have been determined before the ultimate determination of their criminality. Furthermore, that determination ought to have been made applying New York law, because it is New York which has an interest in regulating local insurance business and in defining the legal ramifications of actions within the territorial confines of New York and not Pennsylvania. *See* Leflar, Conflict of Laws: Choice of Law in Criminal Cases, 25 Case Western Res. L. Rev. 44 (1974).[13]

---

13. Leflar states the following concerning the Federal Constitutional limitations on choice-of-law in the criminal context:

> The Federal Constitution, by its due process clause, sets the same outer limits on a state's power to apply its own law to extrastate facts in criminal cases as are set for civil cases. A state may not, under the clause, exercise legislative jurisdiction by applying its substantive law to a set of facts which has no substantial connection with the state. This limitation has been more fully developed by the United States Supreme Court in civil than in criminal litigation, but the rule is stated in general terms:
>
> > Where more than one state has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity. [*Richards* v. *United States*, 369 U.S. 1, 15 (1962).]
>
> The due process clause precludes unrestricted application of spatially irrelevant law by a state court, to a set of facts. The full faith and credit clause, the equal protection clause, and possibly even the privileges and immunities clause of the fourteenth amendment, may buttress this result. But, as the leading case of *Home Insurance Co.* v. *Dick*, [281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926, (1930)] illustrates, the comprehensiveness of the due process requirement assures the result even in fact situations to which

To that end, appellants submitted points for charge. The court accepted part of each point submitted but refused to charge the jury on the remainder. The points as submitted read:

> Under the law, endorsement of a check by the proper person to make such endorsement constitutes an actual and legitimate payment of an obligation. (citation omitted) *If you find from the evidence that either Defendant had the authorization of officers of The Market Facilities, Inc. to endorse said company's name on the checks of the Commonwealth and deposit them in the bank account of Charles W. Ohle, Inc., then you must find that payment was made to the insurance company, and you must find Defendants not guilty.*[14]

NOTES *(Continued)*

some of the other clauses could not apply. Generally speaking, the geographical locations of acts, and the effects of acts, have been the tests of legislative jurisdiction, though the tests are today often expressed in terms of state interests affected by the geographically located acts or effects. Regardless of the language, the requirement is that the acts, and the effects thereof, to which a particular state's law is to be applied, must have some substantial connection with that state.

Leflar, Conflict of Laws, *supra* at 48-49.

Professor Leflar continues, by enumerating the five major choice-influencing considerations with which the courts must deal in determining the law of which state to apply. He lists them as: 1) predictability of results; 2) maintenance of interstate and international order; 3) simplification of the judicial task; 4) advancement of the forum's governmental interests; 5) application of the better rule of law. *Id.* at 61.

And see, Leflar, American Conflicts Law (3rd ed. 1977) at 224-225, where Professor Leflar states:

> "One effect of this localization of prosecutions, almost but not quite unique in conflict's law, is that the question of jurisdiction and that of governing substantive law always receive the same answer. The governing law is always that of the forum state, if the forum court has jurisdiction. Judicial jurisdiction and legislative jurisdiction are identical. In this result criminal cases are different from civil suits. The "difference lies in the 'transitory' (as distinguished from 'local') character of most civil causes of action, by reason of which a cause of action that came into existence under one state's law may be sued upon in another state. Criminal claims are not transitory."

14. Emphasized portion is that portion not read to the jury.

And,

> Under the Insurance Law of the State of New York when an insurance company entrusts its policies to a broker for delivery to the insured, the broker acts as an agent for the insurance company in collecting and receiving premiums, and payment to the broker is deemed payment to the insurance company. (citations omitted) *Therefore, if you find that Defendants received payment of the insurance premium from the Commonwealth of Pennsylvania, you must find that the obligation of the Commonwealth of Pennsylvania was discharged, because payment to the broker was payment to the insurer. Any subsequent failure to transmit moneys to the insurance company would not constitute a violation of the criminal statute under which Defendants are charged.*[15]

The trial judge read to the jury the first sentence of each of these suggested charges but refused to read the second parts of each. By refusing to read the second parts of these charges the trial judge was essentially refusing to submit the jurisdiction-related question presented thereby to the jury for its determination. Clearly this was error, for such a refusal denied the jury the opportunity to determine the Commonwealth's jurisdiction over appellants action, for, although the submitted points for charge address other issues, the determination of those issues goes directly to the heart of the court's jurisdiction. The jury should have been permitted to decide whether or not Charles W. Ohle, Inc. acted as agent of Market Facilities, a New York insurance company, in accepting the premium payments, and as its agent in endorsing the checks. Such a determination by the jury was crucial. If appellants acted as agents for Market Facilities, as that relationship is defined by the law of the State of New York, then appellants' obligations to Pennsylvania were fulfilled insofar as Pennsylvania is concerned in the matter both as insured and as sovereign. If appellants acted in accordance with those provisions of the law of New York there could have been no crime

15. Emphasized portion is that portion not read to the jury.

under Section 3927, *supra*, and no jurisdiction in our courts to prosecute appellants failure to pay the monies over. This is so because once the checks were negotiated by appellants as agents for the insurance company and deposited in appellants' account, under New York law the monies would no longer be payments on the premium yet to be transferred to the insurance company, but funds held by appellants for their principal, the insurance company. On the other hand, if there was no authority in appellants to act on behalf of the insurance company, either as agents in accepting payment or as agents authorized to endorse and cash the check, then the jury could properly consider the question of appellants alleged violation of our criminal statutes since the money would not legally or actually have reached the insurance company. In short, properly the jury should have been allowed to consider the effect of the New York laws and directed to find appellants not guilty of violation of the Pennsylvania statute if their actions were in conformity with the law of New York. It was error not to have charged the jury as requested and a new trial must therefore be granted.[16]

In the appeal by Jackson, at no. 103 March Term 1978, (theft for failure to make required distribution of funds received) judgment of sentence is vacated, conviction is reversed, and the case is remanded for new trial not inconsistent with this opinion.

In the appeal by Ohle, at no. 106 March Term 1978, (theft for failure to make required distribution of funds received) judgment of sentence is vacated, conviction is reversed, and the case is remanded for new trial not inconsistent with this opinion.

---

16. The Commonwealth argues that our courts would still have jurisdiction to try the case and to punish the violation of our statute appellants' actions were even if fully in compliance with the law of New York. The argument is based on the effect of appellants actions in Pennsylvania — the cancellation of the insurance contract by the Reserve Insurance Company. Because of the disposition we make of the case we need not decide the question now but note only that the tracing of the effects of crimes has not been adopted by our courts. *See Commonwealth v. Bertels*, *supra*; and *Commonwealth v. Creamer*, 236 Pa. Super. 168, 345 A.2d 212 (1975).

In the appeal by Ohle, at no. 119 March Term 1979, (bribery and conspiracy) judgment of sentence is vacated, the conviction is reversed, and the indictment quashed.

Jurisdiction relinquished in all three cases.

SUPERIOR COURT OF PENNSYLVANIA
Harrisburg

Commonwealth of Pennsylvania	:	
	:	
v.	:	No. 103 March Term, 1978
	:	
Ronald J. Jackson, Appellant	:	
	:	
Commonwealth of Pennsylvania	:	
	:	
v.	:	
	:	No. 106 March Term, 1978
Charles W. Ohle, Appellant	:	
	:	
Commonwealth of Pennsylvania	:	
	:	
v.	:	No. 119 March Term, 1979
	:	
Charles W. Ohle, Appellant	:	
	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgments of the Court is Common Pleas of Dauphin County are:

No. 103 March Term, 1978:
(theft by failure to make required distribution of funds received) judgment of sentence vacated, the conviction is reversed, and the case is remanded for new trial not inconsistent with this opinion.

No. 106 March Term, 1978:
(theft by failure to make required distribution of funds received) judgment of sentence is vacated, conviction is reversed, and the case remanded for new trial not inconsistent with this opinion.

No. 119 March Term, 1979:
(bribery and conspiracy) judgment of sentence is vacated, the conviction is reversed, and the indictment quashed.

Jurisdiction relinquished in all three cases.

_____

Deputy Prothonotary

Dated: September 25, 1981

APPENDIX F

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA
	:	NOS. 1171, 1173, 1174 CRIMINAL DIVISION 1975
v.	:	
	:	CHARGES: BRIBERY; CONSPIRACY; THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION OF FUNDS RECEIVED
CHARLES W. OHLE	:	

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA
	:	NO. 1179
v.	:	CRIMINAL DIVISION 1975
	:	CHARGE: THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION OF FUNDS RECEIVED
RONALD J. JACKSON	:	

OPINION

BY THE COURT:

Two juries in Dauphin County, Pennsylvania have rendered guilty verdicts in two diffferent cases, finding evidence of wrong by two persons in dealings with at least two officials at a high level in state government. Presently before the Court are motions for new trials and in arrest of judgments. Although the misdeeds are unmistakable, they have now been transformed to afterthoughts and attention must be directed to certain gnawing issues embraced in both actions.

"D"

Opinion of the Dauphin County Court reported at 100 Dauphin 95 (1978).

In the first the defendants, Charles W. Ohle and Ronald J. Jackson, were charged with three counts of theft by failure to make required disposition of funds received. The alleged thefts dealt with premium money paid on the Commonwealth of Pennsylvania policy covering the state automobile fleet to the Reserve Insurance Company of Chicago, Illinois, through Charles W. Ohle, Inc., the broker for said policy. Charles W. Ohle and Ronald J. Jackson were the principals of Charles W. Ohle, Inc. Ohle is a resident of New York and Jackson is a resident of New Jersey. The policy period ran from July 1, 1972 to June 30, 1975. The premium involved was $1,015,000.00. The Commonwealth alleged and produced testimony showing that on July 25, 1974 a Commonwealth check in the amount of $500,000.00 payable to Market Facilities, Inc., New York (a subsidiary of Reserve Insurance) and Charles W. Ohle, Inc. was delivered to agent of Charles W. Ohle, Inc. Further, a check dated August 5, 1974 in the amount of $300,000.00 payable to Market Facilities and Charles W. Ohle, Inc. was also delivered to the brokers. Again, a check dated September 26, 1974 in the amount of $215,000.00 payable to Market Facilities and Charles W. Ohle, Inc. was also delivered to the brokers.

Reserve Insurance Company only received one payment from Charles W. Ohle, Inc. for the policy. The other payments on the premium account were never made. The premium money still owing to Reserve Insurance Company, taking into consideration that one payment has been made and also allowing for the commission which would ordinarily have gone to the brokers, is approximately $609,000.00.

In the second trial, the Pennsylvania Department of Justice filed additional charges of bribery and conspiracy against Charles W. Ohle and Ronald J. Jackson. These charges alleged and the testimony produced showed that from February, 1973 through September, 1974, Ohle and Jackson made kickback payments totalling approximately $176,000.00 to Frank Hilton and Anthony Trucco. At the time, Hilton was the Secretary of Property and Supplies for the Commonwealth of Pennsylvania and

Trucco was head of the Insurance Division within the said Department. The kickbacks were made in consideration for the appointment of Charles W. Ohle, Inc. as the broker for the lucrative automobile fleet insurance policy, the same policy involved in the theft charges.

It should be noted the broker's commission for the automobile fleet policy was 20% of the premium. During this time, it was required by Pennsylvania law that approximately 7% of the premium be paid to the Secretary of Property and Supplies for benefit of the Pennsylvania Higher Education Assistance Agency. This was true for every Commonwealth insurance policy. A broker would receive 13% commission, and the other 7% would be legally paid to the PHEAA through the Secretary of Property and Supplies. In the instant case, the 7% was properly paid by the broker to the PHEAA but an additional sum of money (6%) was paid back to Trucco and Hilton as consideration for appointing Ohle, Inc. broker for the policy. Charles W. Ohle, Inc. was making 7% commission instead of 13%.

By way of further background, the testimony revealed that Trucco met with defendant, Ohle, in New York City in February of 1973 at the request of Hilton for the purpose of arranging to have Charles W. Ohle, Inc., a New York insurance firm, to become the broker of record on the insurance policy. The discussion involved the quid pro quo expected and an agreement having been reached, Charles W. Ohle, Inc. was made broker of record in April, 1973. Although the checks were co-payable as mentioned previously, the defendants were authorized by the insurance company to endorse and deposit the checks into the Charles W. Ohle, Inc. bank account.

On January 16, 1975, the Reserve Insurance Company notified the Commonwealth the policy would be cancelled effective January 27, 1975 for nonpayment of premium monies due and a suit is pending by the insurance company against the Commonwealth demanding payment of the unpaid premium.

The record in these cases also shows that on February 11, 1975, the United States District Court granted immunity to the defendants in connection with their testimony in related prosecutions. The District Attorney of Dauphin County was notified

of this immunity and advised to seal any and all evidence in connection with the crimes of bribery and conspiracy. The District Attorney filed an application to place the evidence under seal and obtained a court order on April 1, 1975, when the criminal complaints were filed against defendants.

There were numerous pre-trial motions filed as well as various motions, including demurrers during the course of the trials. Both defendants were found guilty of theft by failure to make required disposition of funds received in violation of *Section 3927 of the Crimes Code, Act of December 6, 1972, P.L. 1482, No. 334, §1, 18 Pa. C.S. §3927*. During the trial on the bribery and conspiracy cases, the defendant, Ronald J. Jackson, became ill and a mistrial was declared on motion of Jackson. The defendant, Ohle, was found guilty by the jury of both bribery and conspiracy.

The post-trial motions in both cases were argued together before the Court en banc and many of the points in dispute are intertwined. During this discussion reference will be made to the individual case where the question concerns only one case.

The defendants have advanced seven issues which are being passed upon seriatim:

(1) the jurisdiction of the Dauphin County Court over the charge of theft,

(2) the effect of the endorsement of the premium checks by a subsidiary of the insurance company on the theft charge and whether this constitutes payment to the insurance company,

(3) the Court's conduct as error in revealing to the news media its decision on the defendants' demurrer on the question of jurisdiction during the trial on the theft charge,

(4) the Court's refusal to suppress the Commonwealth's evidence on all charges because the defendants gave statements and provided certain records to the District Attorney and the Justice Department officials during negotiations on a plea bargain which was subsequently unacceptable to the Commonwealth,

(5) the Court's refusal of defendants' pre-trial application to dismiss prosecution because defendants allegedly were charged under the Crimes Code and elements of the offenses occurred prior to the enactment of the Crimes Code,

(6) The Court's refusal of the defendants' pre-trial application to dismiss the charge of conspiracy on grounds of merger, and

(7) The Court's refusal to grant the demurrer and motion for directed verdict of acquittal on the charge of bribery and conspiracy since the witnesses produced by the Commonwealth were accomplices whose testimony required corroboration.

Perhaps the predominating issue raised by the defendants is whether this Court had jurisdiction to try the charge of theft by failure to make required disposition of funds received (*18 Pa.C.S. §3927*). Specifically, the defendants allege the crime of theft, if it occurred, was committed in New York and not in Pennsylvania.

The Court agrees with the defendants that the territorial applicability clause set forth in 18 Pa. C.S. §102 is applicable. The pertinent portions of the clause provide: ". . . a person may be convicted under the law of this Commonwealth of an offense committed by his own conduct or the conduct of another for which he is legally accountable if either: (1) the conduct which is an element of the offense or the result which is such an element occurs within this Commonwealth;. . . ."

There are four elements to the offense of theft by failure to make required disposition of funds received. "1. The obtaining of property of another; 2. Subject to an agreement or known legal obligation upon the recipient to make specified payments or other disposition thereof; 3. Intentional dealing with the property obtained as the defendant's own; and 4. Failure of the defendant to make the required disposition of the property."

Commonwealth v. Crafton, Appellant, 240 Pa. Superior Ct. 12, 16 (1976). Followed in Commonwealth v. Bhojwani, 242 Pa. Superior Ct. 406, 411 (1976).

The first element of the offense involved conduct in Dauphin County when an authorized agent for the defendants picked up funds in the form of $500,000.00, $215,000,00 and $300,000.00 checks payable by the Commonwealth of Pennsylvania to Market Facilities of New York and Charles W. Ohle, Inc. (N.T. 236-237, 241 and 254)* The defendants note the word "conduct" as used in 18 Pa.C.S. §102(a)(1) is defined as "[a]n action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions." 18 Pa.C.S. §103.

To impute the agent's acts to the defendants (see 18 Pa. C.S. §306), the Court must decide if the defendants' requisite "accompanying state of mind" was present. Unfortunately, the definition of the theft offense does not provide for the mental state required when the property is obtained (Element #1). See 18 Pa.C.S. §3927(a) and §3901. Turning to the general requirements of culpability (18 Pa.C.S. §302), with respect to each material element of an offense, the person must act "intentionally, knowingly, recklessly or negligently." The evidence at trial showed that at the very least, the agent's obtaining of the money was known by the defendants and intended by them. By itself the conduct of the defendants in knowingly using an agent to obtain the property of another constituted an element of the offense sufficient to provide jurisdiction to this Court under 18 Pa.C.S. §102(a)(1).

The sole case from the courts of this Commonwealth cited by the defendants, Commonwealth v. Dissinger, Appellant, 59 Pa. Superior Ct. 247, 252-255 (1915), where a party without fraud obtained promissory notes to renew other notes and the holder of the original notes refused to renew, the Court held jurisdiction to be in the county where the party mailed the notes to one out of the state for a consideration as the place where the commission occurred.

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* References to notes of testimony are to those from the trial on theft charges.

The question there was venue (called jurisdiction in Dissinger) between counties over violation of Pennsylvania law, whereas in the present case, the dispute is whether Pennsylvania has any subject matter jurisdiction. Second, in a more modern decision regarding county jurisdiction, the Superior Court in Commonwealth v. Prep, Appellant, 186 Pa. Superior Ct. 442, 448 (1958) held that prosecution could be brought in Dauphin County because that is where checks were mailed by the Commonwealth. In Prep, the defendant, who had a contract to supply cinders to the Department of Highways and was charged with cheating by false pretenses, received the checks in Schuylkill County. If posting in a county gives it country jurisdiction then delivery of the checks as here to the defendants' agent also would be sufficient to create jurisdiction in the Commonwealth. Further, and most important, the legislature has presented specific rules for the Court to apply in deciding this question of jurisdiction. Unlike in the cases above, this Court is not required to look at the location where the crime was completed. Rather, it must merely find a single element was committed in the Commonwealth. (18 Pa. C.S. §102(a)(1)) At the Defendants' request (N.T. 315-316), the jury was not instructed on the law (N.T. 340 and as shown by their returning a guilty verdict found the Commonwealth had proven an element had been commited within the Commonwealth.

The Commonwealth points out that not only were the checks issued and delivered in Dauphin County but the legal obligation to make the payment by an appointed broker to the insurance company arose in Dauphin County and the attendant harm of depriving the state of insurance coverage occurred in Dauphin County. The Prep opinion provides an appropriate conclusion:

". . . It is a well established theory of the law that, where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual; consequently, in many circumstances one may become liable to punishment in a particular jurisdiction while his personal presence is elsewhere, and in this way he may even commit an offense against a state or county upon whose soil he has never

set his foot. . . ." Commonwealth v. Prep, Appellant, supra, at 451.

A sufficient ground for jurisdiction having been shown this Court need not delve into the alternative grounds.

The defendants' second agrument concerns the question whether a New York statute authorizing brokers to receive premium payments payable to the insurer bar the jury from finding the defendants guilty of failure to make the required disposition of the property (Element #4 of the offense) in connection with the theft offense.

The transfer in question involved the delivery of the premium checks by the Commonwealth to the defendants' brokerage firm (N.T. 143-144). The checks were made payable to Charles W. Ohle, Inc. and Market Facilities (N.T. 124). The defendants followed the common practice of depositing the premium checks in their premium trust account to be later transferred to the insurer minus the broker's commission (N.T. 128, 143). This premium trust account was in New York City as were the defendant brokers.

Although the premium checks were issued from Pennsylvania, the management of the premium trust account is governed by the local law of the state to which the administration of the trust is most substantially related; in this case New York. Restatement, Second, Conflict of Law, §272. Stampolis, Appellant, v. Lewis, 186 Pa. Superior Ct. 285, 288-289 (1958).

The defendants rely upon the New York Insurance Law, §121, titled "Broker authorized to receive premium, when" and Lezak v. National Grange Mutual Insurance Co., 233 N.Y.S. 2d 607 (Supreme Court 1962). The defendants contend Section 121 as interpreted by Lezak provides that payment to a broker, entrusted by the insurer with delivery of the policy to the insured, is deemed a completed payment to the insurer because the broker acts as agent for the insurer. Thus, they argue, the final element in the theft would be absent, as the defendants would not have failed to make the required disposition of the property.

This theory is faulty. The brokers are merely agents authorized to receive the premium payments but with an obligation to transmit the money to the insurer, that is to make the required

disposition of the property. The parties per the insurance contract expected the premiums (net the commission) to be finally received by the insurer not the broker. Since premiums due on a policy of insurance and paid to an insurance broker for transmission to an insurance company when received by the broker become trust funds, it is the obligation of the broker, in the faithful discharge of his duty to the insured, not to intermingle such moneys with his general funds nor to divert, but to keep the money separate and distinct from his own property and promptly transmit to the insurance company. 29 N.Y. Jur, Insurance, §463. Leterman v. Pink, 291 N.Y.S. 249, 254 (Supreme Court, App. Div. 1936). There is no evidence the New York legislature intended to negate the fiduciary duty of the brokers to relay the funds due to the insurer. Rather the New York legislature has codified the fiduciary capacity of the brokers for all premiums received. New York Insurance Law, §125. See also 11 N.Y.C.R.R. 20.3.

The defendants claim since the Commonwealth avers in its answer in civil action brought by the insurer for payment of the missing premiums that payment to the brokers, as agents of the insurer, was sufficient to bind the insurer to provide coverage, the District Attorney is barred from charging in this criminal action that the brokers had a further duty to relay the money to the insurer. The Commonwealth's contentions are not inconsistent. This is a criminal case where the defendants are charged with misappropriations. The position of a party asserting a defense in a civil action cannot be a ground for exculpation where a crime has been committed.

The defendants' third argument centers on a comment by the Trial Judge. At the conclusion of the Commonwealth's case on the theft offense, counsel argued several motions, including a demurrer on the issue of jurisdiction. The arguments were in Chambers and upon leaving counsel discussed the arguments with the media. Later upon questioning by the media, the Trial Judge informed the reporters that the motions, including the jurisdiction motion, were denied.

The reports that the jurisdiction motion had been denied were on radio and in the local newspaper. Upon questioning by

the Court, three jurors and two alternates admitted seeing or hearing the reports (N.T. 321-322). Immediately, the Court explained to the entire jury that the Court had merely decided the questions of law raised regarding jurisdiction and that the jury's province of deciding any questions of fact regarding jurisdiction was unimpaired. The jurors were instructed not to be influenced by media reports. The jurors then indicated they understood the Court's explanation. The defendants made no motions for mistrial and the trial continued (N.T. 321-323). The defendants now contend the Court committed prejudicial error by revealing to the jury its ruling on the legal questions surrounding jurisdiction. Further, they assert no curative instructions would have been sufficient.

As to the issue of the propriety of the remarks to the newspapers, the statements by the Trial Judge to the press and the reports in the media were very brief. The Judge was reported to have merely said the demurrers were denied. (See Court's Exhibits Nos. 2 and 3.) Following a long line of cases, the Pennsylvania Supreme Court has recently repeated the applicable standard:

> ". . . 'Every unwise or irrelevant remark made in the course of a trial by a judge, a witness, or counsel does not compel the granting of a new trial. A new trial is required when the remark is prejudicial; that is, when it is of such a nature or substance or delivered in such a manner that it may reasonably be said to have deprived the defendant of a fair and impartial trial. . .' . . ." Commonwealth v. Goosby, Appellant, 450 Pa. 609, 611 (1973).

The Judge's reported statements were not prejudicial when viewed within context. The defense counsel made their demurrer on the jurisdiction issue public through the press. Only after the media was informed by the defense of the motions did the Trial Judge briefly note the demurrer had been denied. The defense having voluntarily publicized the presentation of the legal issues surrounding jurisdiction, it is highly probable the motion would have been in the press even without the Judge's answer.

Further, the Judge fully explained to all the jurors in open court that only legal issues had been decided, while the factual issues remained in the jury's province. In the Court's explanation of the demurrer, the Judge instructed the jury that: ". . . the question that comes before a judge on the demurrer is merely a prima facie decision, that is, the court does not take away any authority from the jury to find a decision based upon its conception of what the facts are. . . . " (N.T. 322)

This reference to the prima facie decision was proper as ". . . it is not error for a trial judge to express his opinion as to the weight and effect of the evidence . . . provided also he does not give a binding direction or interfere with the province of the jury. . . . " Commonwealth v. Haas, Appellant, 198 Pa. Superior Ct. 227, 231 (1962).

Further, the Judge instructed the jury the Court had no feeling one way or the other as to what the verdict should be (N.T. 355).

Considering all the circumstances, it is clear beyond a reasonable doubt these defendants were not prejudiced by the Judge's comment. Indeed, when the facts are examined in retrospect, it is doubtful if the defense should have been given the opportunity to argue the jurisdiction question to the jury for the issue may be regarded as purely legal.

Fourth, the defendants claim that the Court erred in refusing to grant a motion to suppress the Commonwealth's evidence resulting from information and statements given by the defendants in reliance upon a written plea bargain. The alleged plea bargain was subsequently withdrawn by the Commonwealth.

The Commonwealth's contention that the motion to suppress was not timely made cannot be sustained as it was made prior to trial in accord with the Pennsylvania Rules of Criminal Procedure, Rule 323. (See defendants' pre-trial application to suppress evidence and transcript of proceedings before Judge Warren G. Morgan on September 30, 1976.)

Noting that neither side has presented controlling authority on the point, the Court refers to Pennsylvania Rules of Criminal Procedure, Rule 319 which states in effect that pleas are not final until accepted by the Court.

The record discloses an agreement, eventually embodied in a letter, between the District Attorney and the defendants to allow the defendants to plead guilty to lesser charges in exchange for the defendant's full cooperation with the Commonwealth. Such cooperation was to include the making of statements and turning over business records to independent auditors. According to the District Attorney, the defendants did not fully cooperate and the plea bargain was withdrawn by the District Attorney. The explanation of events was made at the pre-trial hearing during which the defense sought to suppress the evidence presented by the defendants pursuant to the plea bargain. (See pre-trial hearing before Judge Warren G. Morgan, September 30, 1976, N.T. 41-57.) The motion was properly denied. Although the District Attorney need not present a justification to withdraw a plea agreement before the Court acceptance, a review of the testimony at the pre-trial hearing and the relevant pleadings reveals a justification for the District Attorney's action for even though the defendants did cooperate their information was of little help. Further, the defendants admit in their brief in support of motion for new trial and in arrest of judgment (page 32) that the documents and statements given by the defendants to the Commonwealth were not utilized in either trial although they say they were placed in a position which prevented them from testifying at trial without incriminating themselves or committing prejury.

The defendants also raise a collateral objection, alleging the use of evidence procured by the District Attorney after the federal court granted immunity to both defendants, and the District Attorney had been ordered to seal its evidence. The defendants were granted immunity to compel their testimony in the federal trial of Pennsylvania officials involved in the kickback scheme. "Use" immunity was granted, barring the use in the present state prosecution of any ". . . testimony or other information compelled under the the order (or any information directly or indirectly derived from such testimony or other information) . . . against the witness . . . " 18 U.S.C. §6002. See also Kastigar v. United States, 406 U.S. 441 (1972).

The Commonwealth has the burden of showing by substantial, clear and convincing evidence that information it received in preparing its case against the defendants was obtained from sources independent of testimony and information given under federal immunity. United States v. Rice, 421 F. Supp. 871, 877 (E.D. Ill., 1976). The pre-trial hearing before Judge Warren G. Morgan on September 30, 1976, provided sufficient evidence that in prosecuting the bribery and conspiracy offenses, the Commonwealth not only had its evidence under seal before the defendants gave their testimony in federal court but the chief investigator for the State Department of Justice had obtained his information relative to the wrongdoing wholly independent from the defendants' testimony in the federal cases. And while the evidence obtained for the bribery and conspiracy offenses overlapped the evidence available in the theft charges, it should be observed that the grant of immunity had nothing to do with the theft of the premium monies.

The fifth position of the defendants is the Court erred in refusing to dismiss the prosecution because defendants were erroneously charged under the Crimes Code. The effective date of the Crimes Code was June 6, 1973, and the defendants contend elements of the offenses occurred prior to said date.

In connection with the theft, the defendants assert an essential element, i.e., the "obtaining property upon agreement or subject to a known legal obligation to make specified payments or other disposition" occurred prior to June 6, 1973. They point to the evidence showing the earlier dates of the appointment of defendants as brokers and the issuance of the insurance policy and urge that these happenings, being regarded as the "agreement" or "known legal obligation" mean there can be no prosecution under the Crimes Code for these elements of the offense occurred prior to the effective date of the Act.

This reasoning must be fallacious. The theft complaints and indictments state the thefts occurred on or about July 25, August 5 and September 26, 1974. These dates are subsequent to June 6, 1973. True, testimony was introduced showing the original arrangements between the Commonwealth and Charles W. Ohle, Inc. as taking place prior to the enactment of the Crimes

Code but it wasn't until after the enactment that the offenses occurred, and the defendants actually misused Commonwealth funds. The "agreement" and "legal obligation" were continuous and did not terminate at a fixed time.

As to the bribery and conspiracy charges, the defendants' argument does not have as much merit as it appears at first blush. A review of the complaints shows that in connection with the bribery, the citations are to the applicable sections under the Penal Code, 18 P.S. §4303 and the Crimes Code, 18 Pa. C.S. §4701. The defense objects because the actual indictments merely list the section number of the Crimes Code. The defense relies upon the wording of Pennsylvania Rule of Criminal Procedure 213 which sets forth the requirements in the form of the indictment and states the essential elements of the offense as recited in the indictment must be substantially the same as or cognate to the offense alleged in the complaint. Although the narration on the face of the indictments is couched in language which conforms generally to the recitation of the Crimes Code, the words sufficiently describe the offenses of bribery and conspiracy under both applicable laws, the Penal Code and the Crimes Code. Under such circumstances, the requirements of said Rule 213 have been satisfied.

The two acts in question have differences. Bribery and conspiracy were changed from misdemeanors to felonies and the penalty for theft was increased. The available defenses may have changed, as defendants argue, and the Commonwealth may have been strengthened by utilization of the new statute. But none of these factors are of significance in the framework of these cases. The parties were not in reality deprived of their defenses. And as a matter of simple logic, the Commonwealth cannot be thwarted in its duties as prosecutor because of an abstract supposition.

As its sixth point, the defense says the Court erred in refusing the pre-trial application to dismiss the charge of conspiracy on the ground of merger. The defense argues the crime of conspiracy in this factual situation was concluded with the agreement to commit the bribery for both arose from the meeting in New York City in February of 1973 when the agreement to pay

the kickback and the appointment of the broker occurred as parts of the same transaction.

The difficulty with this rationale is that the two crimes do not consist of the same essential elements. The conspiracy would be complete at the time the agreement was reached and while the bribery in the instant case was initiated at the incident of agreement, it was made complete when the monies in question were conferred upon the Pennsylvania officials.

The final point made on behalf of the defendant, Ohle, on the charges of bribery and conspiracy is that the Court erred in refusing to grant the demurrer and motion for directed verdict of acquittal since the only witnesses produced by the Commonwealth were accomplices whose testimony was not corroborated.

The Crimes Code has no provision for corroboration but under the Penal Code, 18 P.S. §2, repealed effective June 6, 1973, it is provided that in a bribery case an accused shall not be convicted on the testimony of an accomplice unless the same be corroborated by other evidence or the circumstances of the case. The defense states the same rule is applicable to testimony by accomplices on the conspiracy charge.

The Commonwealth does not dispute that the substantial testimony offered against the defendant, Ohle, came from accomplices and indeed co-conspirators. However, looking at the "circumstances of the case" (see Commonwealth v. Staudenmayer, Appellant, 230 Pa. Superior Ct. 521 (1974)), there was an abundance of corroboration. The defendants themselves never challenged the conduct and transactions alleged by the Commonwealth. Indeed, through the cross-examination of the several witnesses and in argument before the jury and statements during the trial, the defense acknowledged the kickbacks occurred but contended they were victims of extortion. Surely with the bribery and conspiracy so manifest, this case must be cognizable under the "circumstances of the case" interpretation of the Penal Code.

The defendants in their conclusion to their written arguments ask this Court to use wisdom and render a decision which

is just and fair. Their courses of reasoning were skillfully presented and require commendation. But following their admonition to be fair and just, we enter the following

ORDER

AND NOW, March 30, 1978, the motions for new trials and in arrest of judgments filed on behalf of Charles W. Ohle and Ronald J. Jackson in connection with the charge of theft by failure to make required disposition of funds received indexed to Nos. 1174 and 1179 Criminal Division 1975 and the motions for new trial and in arrest of judgment filed on behalf of Charles W. Ohle to the bribery charge indexed to No. 1171 Criminal Division 1975 and the conspiracy charge indexed to No. 1173 Criminal Division 1975 are all denied; the District Attorney is directed to call the defendants for sentencing.

William W. Lipsitt, Judge

APPENDIX G

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA
vs.	:	NOS. 1171, 1173 C.D. 1975
CHARLES W. OHLE	:	CHARGES: BRIBERY, CONSPIRACY

SUPPLEMENTAL OPINION

The defendant, Charles W. Ohle, had been tried on several charges arising from misdoings in connection with the obtaining of insurance and premium payments from the Commonwealth of Pennsylvania. He was found guilty by juries in Dauphin County. The motions for new trial and in arrest of judgment were argued before the Court en banc, and an opinion which includes the history and background of the cases appears at 100 Dauph. 95 (1978).

In connection with the trial on the charges of bribery and conspiracy indexed to 1171 C.D. 1975 and 1173 C.D. 1975, respectively, the defense counsel, after reviewing the transcript, presented an additional issue which was not previously determined by this Court.

During the said trial, a witness, Anthony J. Trucco, who had been convicted in a Federal Court proceeding and was giving testimony for the State, was on cross-examination and was asked for explanations relative to his earlier plea of guilty to an extortion charge. As the questioning progressed, Mr. Trucco stated something to the effect that despite the guilty plea, he had not extorted money from the defendant, Charles W. Ohle. The colloquy continued as follows:

"Q. Did you plead guilty in Federal Court to the crime that you didn't commit?

A. I don't know that. I pleaded guilty to that charge that they were charging me with for one reason. I knew I

was guilty of wrongdoing and I knew at that point when these gentlemen stole $765,000—" (N.T. 134) (Underlining ours)

As soon as Mr. Trucco made this reference to the defendant's conduct, counsel requested a mistrial. Following a conference at side-bar, the motion was denied, and the trial court gave a cautionary instruction to the jury. The defendant now asserts he is entitled to a new trial due to "the Commonwealth witness's unresponsive and prejudicial reference to defendant's prior criminal activity." It is argued that despite the issuance of the cautionary instruction, the harm caused was so prejudicial, the defect could not have been cured.

The problem with the defendant's position is that the remark must be considered in the framework of the entire trial. It was in fact very insignificant in light of the overwhelming evidence against the defendant. The response itself was given under rigorous cross-examination about a matter which was unrelated to the crimes in question. And if there was any harm, which is doubtful, the immediate cautionary instruction was sufficient to correct any possible prejudice. In Commonwealth v. Goosby, 450 Pa. 609, 611 (1973) it was said:

> ". . . 'Every unwise or irrelevant remark made in the course of a trial by a judge, a witness, or counsel does not compel the granting of a new trial. A new trial is required when the remark is prejudicial; that is, when it is of such a nature or substance or delivered in such a manner that it may reasonably be said to have deprived the defendant of a fair and impartial trial'. . . ."

In view of the overall nature of the trial and after giving consideration to what effect this solitary comment could have had, it must be concluded that the instant response could not and did not deprive the defendant of a fair and impartial trial.

Accordingly, we enter the following

ORDER

And Now, June 8, 1979, the motion of defendant, Charles W. Ohle, for a new trial based on certain testimony by a Commonwealth witness is denied.

BY THE COURT:

_____

William W. Lipsitt, Judge

APPENDIX H

CHAPTER 47

BRIBERY AND CORRUPT INFLUENCE

§4701. Bribery in official and political matters.

(a) Offenses defined.—A person is guilty of bribery, a felony of the third degree, if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

(1) any pecuniary benefit as consideration for the decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter by the recipient;

(2) any benefit as consideration for the decision, vote, recommendation or other exercise of official discretion by the recipient in a judicial, administrative or legislative proceeding; or

(3) any benefit as consideration for a violation of a known legal duty as public servant or party official.

(b) Defenses prohibited.—It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, had left office, or lacked jurisdiction, or for any other reason.

Cross references to 1939 Penal Code

18 PS §§4303, 4305, 4308, 4818, 4874
Penalty: Increased from 5 to 7 years

Joint State Gov't Comm'n (1967)

Comment: This section is derived from Section 240.1 of the Model Penal Code.

Under Section 303 of The Penal Code of 1939 (18 PS §4303) a person bribing certain Commonwealth officials may be imprisoned for one year while the person accepting the bribe may be imprisoned by separate and solitary confinement for five years. See also Section 304 of The Penal Code of 1939 (18 PSA §4304) which overlaps and contradicts Section 303 to some extent.

524 "F"

18 Pa.C.S. §4701 (Crimes Code)

§4303. Bribery of Governmental officers and employes; judges, jurors, etc.

Whosoever shall directly or indirectly, or by means of and through any artful and dishonest device whatever, give or make any promise, contract or agreement, for the payment, delivery, or alienation of any money, goods or other thing, in order to obtain or influence the vote, opinion, verdict, award, judgment, decree, or behavior of any member of the General Assembly, or any officer or employe of this Commonwealth, or of any political subdivision thereof, or any judge, juror, justice, referee or arbitrator, in any bill, action, suit, complaint, indictment, controversy, matter or thing whatsoever, depending or which shall depend before him or them, is guilty of bribery, a misdemeanor, and on conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars ($500), or to undergo imprisonment by separate or solitary confinement at labor not exceeding one (1) year, or both.

The member of assembly, or officer, or employe of the Commonwealth or of any political subdivision thereof, or any judge, juror, justice, referee, or arbitrator, who shall accept or receive, or agree to accept or receive such bribe, is guilty of receiving a bribe, a felony, and on conviction thereof, shall be sentenced to pay a fine not exceeding one thousand dollars ($1,000), or to undergo imprisonment by separate or solitary confinement at labor not exceeding five (5) years, or both. As amended 1963, July 31, P.L. 421, §1.

Repealed

Act 1972, Dec. 6, P.L. ____, No. 334, §5, repealed this section effective six months from date of final enactment.

Forfeiture of office, see section 121 of Title 65, Public Officers.

Library references

Bribery 1(2).
C.J.S. Bribery §§1, 3.
P.L.E. Bribery §1.

Supplementary Index to Notes
Verdict 11.5

3. Common law

The Pennsylvania School Code and/or the Penal Code of 1939 have not superseded the common law so as to render inapplicable the common law as to bribery and solicitation to commit a bribe. Com. v. Shipp, 30 D. & C.2d 370, 53 Luz.L.Reg. 148, 1964.

Neither the Public School Code, section 1—101 et seq. of Title 24, nor section 4101 et seq. of this title, 18 P.S.

"E"
18 P.S. §4303 (Penal Code)

APPENDIX I

IN THE COURT OF COMMON PLEAS
OF DAUPHIN COUNTY

NO. 1171 CRIMINAL DIVISION, 1975

COMMONWEALTH OF PENNSYLVANIA

vs.

CHARLES W. OHLE

THE DISTRICT ATTORNEY of Dauphin County by this bill of indictment presents that, on (or about) February, 1973, through September, 1974, in said County, one

Charles W. Ohle

did offer, agree to confer, and confer upon another any pecuniary benefit as consideration for the decision, opinion, recommendation or other exercise of discretion of a public servant by the recipient.

Other person(s) : Anthony J. Trucco and Frank J. Hilton

Public servant (s): Trucco: Director, Insurance Bureau, Pennsylvania Department of Property and Supplies

Hilton: Secretary of Property and Supplies, Commonwealth of Pennsylvania.

Pecuniary benefit: $176,000

Action: Did confer rebates and kickbacks to Pennsylvania Officials (Hilton, Trucco) which represented a portion of premiums for insurance policies purchased by the Commonwealth of Pennsylvania to influence his selection as broker for said policies by Frank Hilton and Anthony Trucco.

Certified: A True Copy
Nov. 8, 1985
Russell L. Sheaffer
Clerk of the Court

All of which is against the peace and dignity of the Commonwealth of Pennsylvania

LeRoy S. Zimmerman

District Attorney

B.

COMMONWEALTH NO. 1171 CRIMINAL DIVISION 75
vs. CHARGE: BRIBERY
18 Pa.S. 4701

CHARLES OHLE

And now, this 11th day of June, 1975, the Bill of Indictment is:
APPROVED [✓] DISMISSED [ ] COSTS_____
Wallace R. Conway
Foreman

Defendant, being advised of the offense charged in the bill of indictment and of_____ rights, hereby (in open court) waives all formal proceedings and consents to proceed on the within bill of indictment presented by the attorney for the Commonwealth.

Date	Defendant	Attorney for Defendant

Defendant, being advised of the offense charged in the bill of indictment/indictment and of his rights, hereby (in open court) enters a plea of not guilty entered by Court.

Jan. 23, 1976		Smith B. Gephart
Date	Defendant	Attorney for Defendant
June 30, 1976	Charles W. Ohle	Smith B. Gephart

Defendant pleads not guilty and with the consent of his attorney and the approval of the judge, waives a jury trial and elects to be tried by a judge without a jury.

Date	Defendant	Attorney for Defendant

_____APPROVED:_____
District Attorney Judge

Defendant, being advised of the offense charged in the bill of indictment/indictment and of _____rights, hereby (in open court) changes his plea to _____.

_____ _____ _____
Date Defendant Attorney for Defendant

_____

WITNESSES

Edward Golla, Prosecutor

APPENDIX J

IN THE COURT OF COMMON PLEAS
OF DAUPHIN COUNTY

NO. 1173 CRIMINAL DIVISION, 1975

COMMONWEALTH OF PENNSYLVANIA

vs.

CHARLES W. OHLE

THE DISTRICT ATTORNEY of Dauphin County by this bill of indictment presents that, on (or about) February 1973, and divers other times thereafter, in said County, one

Charles W. Ohle

did with the intent of promoting or facilitating the commission of a crime agree with one or more other persons to engage in conduct which constituted such crime or an attempt or solicitation to commit such crime.

Crime — Bribery

Other person (s) — Charles W. Ohle, Ronald Jackson, Anthony J. Trucco, Frank C. Hilton and Noel T. Bernard

Conduct — Agree to confer rebates and kickbacks upon Pennsylvania officials as consideration in appointing Charles W. Ohle, Inc. as broker on Commonwealth Insurance Policies.

Certified: A True Copy
Nov. 8, 1985
Russell L. Sheaffer
Clerk of the Court

All of which is against the peace and dignity of the Commonwealth of Pennsylvania.

Leroy S. Zimmerman
District Attorney

B.

COMMONWEALTH NO. 1173 CRIMINAL DIVISION 75
vs. CHARGE: CONSPIRACY
18 Pa.S. 903

CHARLES W. OHLE

And now, this 11th day of June, 1975, the Bill of Indictment is:
APPROVED [✓] DISMISSED [ ] COSTS_____

Wallace R. Conway
Foreman

Defendant, being advised of the offense charged in the bill of indictment and of_____ rights, hereby (in open court) waives all formal proceedings and consents to proceed on the within bill of indictment presented by the attorney for the Commonwealth.

Date	Defendant	Attorney for Defendant

Defendant, being advised of the offense charged in the bill of indictment/indictment and of his rights, hereby (in open court) enters a plea of not guilty entered by Court.

Jan. 23, 1976		Smith B. Gephart
Date	Defendant	Attorney for Defendant
June 30, 1976	Charles W. Ohle	Smith B. Gephart

Defendant pleads not guilty and with the consent of his attorney and the approval of the judge, waives a jury trial and elects to be tried by a judge without a jury.

Date	Defendant	Attorney for Defendant

APPROVED:

District Attorney	Judge

Defendant, being advised of the offense charged in the bill of indictment/indictment and of _____rights, hereby (in open court) changes his plea to _____.

_____	_____	_____
Date	Defendant	Attorney for Defendant

WITNESSES

Edward Golla, Prosecutor

APPENDIX K

IN THE COURT OF COMMON PLEAS
OF DAUPHIN COUNTY

NO. 1174 CRIMINAL DIVISION, 1975

COMMONWEALTH OF PENNSYLVANIA

vs.

CHARLES W. OHLE

THE DISTRICT ATTORNEY of Dauphin County by this bill of indictment presents that, on (or about) July 25, August 6, 1974, in said County, one

Charles W. Ohle

did obtain property upon agreement or subject to a known legal obligation to make specified payments or other disposition and did intentionally deal with said property as his own and fail to make the required payment or disposition.

Property — (1) Commonwealth of Pennsylvania check, No. 580131, Warrant No. 211811, dated 25 July 74 in the amount of $500,000.00, payable to Market Facilities N.Y. and Charles W. Ohle, Inc.

— (2) Commonwealth of Pennsylvania check No. 596028, Warrant No. 215246, dated 5 August 1974 in the amount of $300,000.00 payable to Market Facilities N.Y. Inc., and Charles W. Ohle.

Legal obligation — to pay said monies to Market Facilities, Inc., and/or Reserve Insurance Company on the Commonwealth of Pennsylvania account for the automobile fleet insurance coverage

Certified: A True Copy
Nov. 8, 1985
Russell L. Sheaffer
Clerk of the Court

All of which is against the peace and dignity of the Commonwealth of Pennsylvania.

Leroy S. Zimmerman
District Attorney

B.

COMMONWEALTH *vs.* CHARLES W. OHLE

NO. 1174 CRIMINAL DIVISION 75
CHARGE: THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION OF FUNDS RECEIVED
18 Pa.S. 3927

And now, this 11th day of June, 1975, the Bill of Indictment is:
APPROVED [✓] DISMISSED [ ] COSTS_____

Wallace R. Conway
Foreman

Defendant, being advised of the offense charged in the bill of indictment and of_____ rights, hereby (in open court) waives all formal proceedings and consents to proceed on the within bill of indictment presented by the attorney for the Commonwealth.

Date	Defendant	Attorney for Defendant

Defendant, being advised of the offense charged in the bill of indictment/indictment and of his rights, hereby (in open court) enters a plea of not guilty entered by Court.

Jan. 23, 1976		Smith B. Gephart
Date	Defendant	Attorney for Defendant
June 30, 1976	Charles W. Ohle	Smith B. Gephart

Defendant pleads not guilty and with the consent of his attorney and the approval of the judge, waives a jury trial and elects to be tried by a judge without a jury.

Date	Defendant	Attorney for Defendant

APPROVED: _____

_____ Judge
District Attorney

Defendant, being advised of the offense charged in the bill of indictment/indictment and of _____rights, hereby (in open court) changes his plea to _____.

_____ _____ _____
Date Defendant Attorney for Defendant

_____

WITNESSES

Ronald Lench, Prosecutor

APPENDIX L

NO. 1179 CRIMINAL DIVISION, 19

COMMONWEALTH OF PENNSYLVANIA

vs.

RONALD J. JACKSON

THE DISTRICT ATTORNEY of Dauphin County by this bill of indictment presents that, on (or about) July 25 and August 6, 1974, in said County, one

Ronald J. Jackson

did obtain property upon agreement or subject to a known legal obligation to make specified payments or other disposition and did intentionally deal with said property as his own and fail to make the required payment or disposition.

Property — (1) Commonwealth of Pennsylvania check, No. 580131, Warrant No. 211811, dated 25 July 74 in the amount of $500,000.00, payable to Market Facilities N.Y. and Charles W. Ohle, Inc.

— (2) Commonwealth of Pennsylvania check No. 596028, Warrant No. 215246, dated 5 August 74 in the amount of $300,000.00 payable to Market Facilities N.Y. Inc., and Charles W. Ohle.

Legal obligation — to pay said monies to Market Facilities, Inc., and/or Reserve Insurance Company on the Commonwealth of Pennsylvania account for the automobile fleet insurance coverage.

Certified: A True Copy
Nov. 8, 1985
Russell L. Sheaffer
Clerk of the Court

All of which is against the peace and dignity of the Commonwealth of Pennsylvania.

Leroy S. Zimmerman

District Attorney

B.

COMMONWEALTH
vs.

NO. 1179 CRIMINAL DIVISION 75
CHARGE: THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION OF FUNDS RECEIVED
18 Pa.S. 3927

RONALD J. JACKSON

And now, this 11th day of June, 1975, the Bill of Indictment is:
APPROVED [✓] DISMISSED [ ] COSTS_____

Wallace R. Conway
Foreman

Defendant, being advised of the offense charged in the bill of indictment and of_____ rights, hereby (in open court) waives all formal proceeding and consents to proceed on the within bill of indictment presented by the attorney for the Commonwealth.

Date	Defendant	Attorney for Defendant

Defendant, being advised of the offense charged in the bill of indictment/indictment and of his rights, hereby (in open court) enters a plea of not guilty entered by Court.

Jan. 23, 1976		Smith B. Gephart
Date	Defendant	Attorney for Defendant
June 30, 1976	R. Jackson	Smith B. Gephart

Defendant pleads not guilty and with the consent of his attorney and the approval of the judge, waives a jury trial and elects to be tried by a judge without a jury.

Date	Defendant	Attorney for Defendant

_____ APPROVED: _____
District Attorney Judge

Defendant, being advised of the offense charged in the bill of indictment/indictment and of _____rights, hereby (in open court) changes his plea to _____.

_____ _____ _____
Date Defendant Attorney for Defendant

_____

WITNESSES

Edward Golla, Prosecutor

APPENDIX M

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	DAUPHIN COUNTY,
	:	PENNSYLVANIA
	:	
vs.	:	NO. 1171 Criminal Div., 1975
	:	Charge: BRIBERY
	:	
CHARLES W. OHLE, *Defendant*	:	NO. 1173 Criminal Div., 1975
	:	Charge: CONSPIRACY

MOTION FOR NEW TRIAL
AND
IN ARREST OF JUDGMENT

AND NOW, this 22nd day of December, 1977, comes Defendant above, by his Attorney, Smith B. Gephart, Esquire, and submits herewith Motion for New Trial and in Arrest of Judgment in the abovecaptioned matters for the following reasons:

1. The verdict was contrary to the evidence.
2. The verdict was contrary to the weight of the evidence.
3. The verdict was contrary to the law.
4. The Court erred in denying Defendant's motions to dismiss on demurrer upon conclusion of the Commonwealth's case, and motions for a directed verdict of acquittal after Defendant rested his case.
5. The Court erred in denying Defendant's motion to quash indictments and dismiss prosecution based upon indictments which charged Defendant under the Crimes code; which Code was not effective at the time the crimes, if any, were committed.
6. The Court erred in denying Defendant's motion to quash indictments and dismiss prosecution, and in denying Defendant's motion to dismiss the charge of Conspiracy made at the conclusion of the Commonwealth's case, which motions were based, inter alia, on the doctrine of merger.
7. The Court erred in denying Defendant's motion to quash indictments and dismiss prosecution, and in denying Defen-

dant's demurrer and motion for directed verdict of acquittal, based upon collateral estoppel.

8. The court erred in charging the jury on the crime of Bribery under the Penal Code, specifically set forth under 18 P.S. §4303, since Defendant was not indicted under this law.

9. The Commonwealth's evidence was insufficient to prove Defendant guilty, since the Commonwealth's witnesses, specifically Anthony Trucco and Noel Bernard, were accomplices, and under the law, Defendant cannot be convicted on the testimony of an accomplice, unless such testimony is corroborated by other evidence, or the circumstances of the case.

10. The Court erred in refusing to charge the jury on Defendant's oral requests and written points for charge.

11. The court erred in refusing to suppress, as requested, statements of witnesses, which statements were obtained as a direct result of Defendant's cooperation under a grant of Federal immunity and a written Agreement which was unilaterally breached by the District Attorney. In addition, the Court erred in refusing to grant a hearing, as requested, on the issue of "taint" respecting such testimony.

12. The Commonwealth's proof was legally insufficient to convict Defendant.

13. The Court erred in denying Defendant's Pre-trial Motions, including Motion for Bill of Particulars and Motion for Discovery and Inspection.

Defendant respectfully requests the right to file additional and supplemental reasons for a new trial and in arrest of judgment when the Notes of Testimony taken at the trial have been transcribed and a copy thereof made available to counsel, it being understood that the points set forth in the within Motion will be argued with Motions set for argument in other cases wherein Defendant was adjudged guilty on June 3, 1977.

WHEREFORE, Defendant prays your Honorable Court to direct the transcription of the Notes of Testimony taken at the trial and further to grant Defendant sixty days after receipt of the Notes of Testimony within which to file additional and supplemental reasons for a new trial and arrest of judgment, and to

grant thereafter Defendant's Motion in Arrest of judgment or, in the alternative, Motion for New Trial.

Respectfully submitted:

Smith B. Gephart, Esquire
Attorney for Defendant

DATE: December 22, 1977

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS DAUPHIN COUNTY, PENNSYLVANIA
	:	
vs.	:	NO. 1171 Criminal Div., 1975 Charge: BRIBERY
	:	
CHARLES W. OHLE, *Defendant*	:	NO.1173 Criminal Div., 1975 Charge: CONSPIRACY

ORDER

AND NOW, this 22nd day of December, 1977, upon consideration of the within Motion for New Trial and In Arrest of Judgment, it is hereby ORDERED that the Notes of Testimony in the above captioned matters be transcribed and a copy thereof be made available to Counsel for Defendant. It is further Ordered that Defendant be given a period of 30 days after receipt of the Notes of Testimony within which to file additional and supplemental reasons for a new trial, with the understanding that the points set forth in the within Motion shall be argued with Motions set for argument in other cases wherein Defendant was adjudged guilty on June 3, 1977.

BY THE COURT:

_____

J.

Certified: A True Copy
November 8, 1983
Russell L. Shaeffer
Clerk of the Court

APPENDIX N

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS DAUPHIN COUNTY, PENNSYLVANIA
vs.	:	No. 1174 Criminal Div., 1975 Charge: THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION OF FUNDS RECEIVED
CHARLES W. OHLE, *Defendant*	:	
COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS DAUPHIN COUNTY, PENNSYLVANIA
vs.	:	No. 1179 Criminal Div., 1975 Charge: THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION OF FUNDS RECEIVED
RONALD J. JACKSON, *Defendant*	:	

MOTION FOR NEW TRIAL AND IN ARREST OF JUDGMENT

AND NOW, this 13th day of June, 1977, come Defendants above by their Attorneys, Smith B. Gephart, Esquire, and Lawrence K. Feitell, Esquire, and submit herewith joint Motion for New Trial and in Arrest of Judgment in the above-captioned matters for the following reasons:

Certified: A True Copy
November 8, 1985
Russell L. Schaffer
Clerk of the Court

1. The verdict was contrary to the evidence.

2. The verdict was contrary to the weight of the evidence.

3. The verdict was contrary to the law.

4. The Court lacked jurisdiction in these matters, since the charged crimes, if committed, were committed in the State of New York and not in the Commonwealth of Pennsylvania.

5. The Indictments were defective for the reasons set forth in Paragraph 4 above.

6. The Commonwealth failed as a matter of law to sustain its burden of proving Defendants guilty, since the Commonwealth's evidence showed that officers of Market Facilities, Inc. authorized Defendants to receive the Commonwealth's co-payable checks and endorse the corporation's name thereon, which authorization constituted acknowledgement of payment and receipt by the corporation of the insurance premiums, and therefore the Commonwealth did not as a matter of law prove that Defendants failed to make proper disposition of funds as charged in the Indictments.

7. The Commonwealth's evidence proved that no crime was committed as a matter of law because receipt of the premium by the broker constituted payment to the insurance carrier under law of the State of New York and the law of the Commonwealth of Pennsylvania.

8. The Court erred in refusing to charge the Jury, as requested, on the law of the State of New York and the law of the Commonwealth of Pennsylvania, as set forth in Paragraph 7 above.

9. The Court erred in refusing to charge the Jury on Defendants' oral requests and written points for charge.

10. The Court erred in denying Defendants' motions to dismiss on demurrer upon conclusion of the Commonwealth's case, and motions for a directed verdict of acquittal after Defendants' case.

11. The Court erred in its charge on reasonable doubt by refusing to charge, as requested, that a reasonable doubt could be based on the absence or lack of evidence.

12. The Court erred in refusing to charge, as requested, that the innocence of the Defendants would be equivalent to a reasonable doubt. This was error because the innocence of the Defendant is never a factor in a case and the Defendants have no burden to prove their innocence.

13. The Court erred in refusing to suppress, as requested, various Commonwealth exhibits which were obtained from Defendants' files following the grant of Federal immunity, and which were obtained from or provided by Defendants to the Commonwealth based upon an existing written Agreement which was unilaterally breached by the District Attorney. In addition, the Court erred in refusing to grant a hearing, as requested, on the issue of "taint" respecting such exhibits.

14. The Court erred in revealing to the media its decision on the demurrer motions, particularly with respect to jurisdiction. The resultant media publicity regarding the Court's decision on the issue of jurisdiction was prejudicial and warranted a mistrial, as specifically requested by Defendants.

15. The Commonwealth's proof was legally insufficient to connect either Defendant to the commission of any crime.

16. The Court erred in denying Defendants' Pre-Trial Motions, including Motions to Dismiss and Quash, Motion to Suppress Evidence, Motion for Bill of Particulars and Motion for Discovery and Inspection.

17. The Court erred in overruling Defendants' objections during final summation by the District Attorney, which objections were made on the basis of improper and inflammatory remarks by the District Attorney, and further erred in failure to instruct the Jury to disregard the improper and inflammatory remarks.

Defendants respectfully request the right to file additional and supplemental reasons for a new trial and arrest of judgment when the Notes of Testimony taken at the trial have been transcribed and a copy thereof made available to Counsel for Defendants.

WHEREFORE, Defendants pray your Honorable Court to direct the transcription of the Notes of Testimony taken at the trial and further to grant Defendants sixty days after receipt of

the Notes of Testimony within which to file additional and supplemental reasons for a new trial and arrest of judgment, and to grant thereafter Defendants' Motion in Arrest of Judgment or, in the alternative, Motion for New Trial.

Respectfully submitted:

Smith B. Gephart, Esquire
Attorney for Charles W. Ohle

Lawrence K. Feitell, Esquire
Attorney for Ronald J. Jackson

By_____
Smith B. Gephart, Esquire

DATE: June 13, 1977

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS DAUPHIN COUNTY, PENNSYLVANIA
vs.	:	No. 1174 Criminal Div., 1975 Charge: THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION OF FUNDS RECEIVED
CHARLES W. OHLE, *Defendant*	:	
COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS DAUPHIN COUNTY, PENNSYLVANIA
vs.	:	No. 1179 Criminal Div., 1975 Charge: THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION OF FUNDS RECEIVED
RONALD J. JACKSON, *Defendant*	:	

ORDER

AND NOW, this 15th day of June, 1977, upon consideration of the within Motion for New Trial and In Arrest of Judgment, it is hereby ORDERED that the Notes of Testimony in the above captioned matter be transcribed and a copy thereof be made available to Counsel for Defendants at the cost to Defendants. It is further ORDERED that Defendants be given a period of 30 days after receipt of the Notes of Testimony within which to file additional and supplemental reasons for a new trial.

A-121

BY THE COURT:

_____

J.

Certified: A True Copy
November 8, 1985
Russell L. Schaffer
Clerk of the Court

CERTIFICATE OF SERVICE

Smith B. Gephart, Esquire, does not hereby certify that service of Motion for New Trial and In Arrest of Judgment filed on behalf of Defendants, was made on the District Attorney of Dauphin County by personally delivering a copy of said document to Richard A. Lewis, Esquire, Assistant District Attorney, on June 13, 1977.

Smith B. Gephart, Esquire

APPENDIX O

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
vs.	:	OF DAUPHIN COUNTY, PENNSYLVANIA
CHARLES W. OHLE, *Defendant*	:	Nos. 1171, 1173, 1174 Criminal Division 1975
COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
vs.	:	OF DAUPHIN COUNTY, PENNSYLVANIA
RONALD J. JACKSON, *Defendant*	:	No. 1179 Criminal Division 1975

TRANSCRIPT OF PROCEEDINGS
SENTENCING

BEFORE: HONORABLE WILLIAM W. LIPSITT
DATE: April 21, 1978
PLACE: Courtroom No. 1
Dauphin County Courthouse
Harrisburg, Pennsylvania

COUNSEL PRESENT:
RICHARD A. LEWIS, Esquire, Chief Deputy District Attorney
For — Commonwealth
SMITH MARTON GEPHART, Esquire
For — Defendants

MR. LEWIS: Your Honor, this is the time and place set for the sentencing in the case captioned the Commonwealth of Pennsylvania versus Charles W. Ohle, on cases indexed to 1171 Criminal Division 1975, on a charge of bribery; 1173 Criminal Division 1975, on a charge of conspiracy; and 1174 Criminal Division 1975, on a charge of failure to make required disposition of funds received. May the record reflect the presence of Mr. Ohle in the Courtroom along with his Attorney, Mr. Gephart.

This is also the time and place set for sentencing in the matter of the Commonwealth of Pennsylvania versus Ronald J. Jackson, indexed to No. 1179 Criminal Division, on a charge of theft by failure to make required disposition of funds received. May the record also reflect the presence of Mr. Jackson in the Courtroom also together with Mr. Gephart as counsel.

Your Honor, in the theft cases, both Defendants were tried and convicted by a Dauphin County Jury on June 6, 1977 and post trial motions were subsequently filed and argued before this Court.

Mr. Ohle was convicted of the bribery and conspiracy charges by a Dauphin County Jury on December 13, 1977. Post trial motions were subsequently filed in that case. All motions were heard and argued on the same date and in a written opinion dated March 30, 1978, Your Honor denied the post trial motions and ordered the Defendants to appear for sentencing.

Just to refresh your recollection, Your Honor, Mr. Jackson is on my extreme left, Mr. Ohle is next to me.

MR. GEPHART: Your Honor, I believe received a presentence investigation.

THE COURT: I did.

MR. GEPHART: I will not go into the background of these two men.

THE COURT: The Court knows it very well.

MR. GEPHART: I Would like to say just a few things, Your Honor.

As I indicated to this Court during argument sessions the facts showed on the bribery charge, and I don't think the Office of the District Attorney will dispute it, that these two men did

not come to the State of Pennsylvania with the thought of bribing any state officials. The facts, I think, would show that Mr. Trucco traveled on several occasions to New York.

The Insurance Company, through Mr. Bernard, the Resident Vice-President, recommended these two men to act as brokers on this policy and I would hope that the Court would take this into consideration in pronouncing sentence.

These two men stand before you for sentencing, Judge Lipsitt, they have never in their lives been convicted or ever accused of committing a crime. They come to this Court with clean hands as far as background goes.

During argument and in my brief one of the points that I tried to raise with this Court was the fact that particularly on the bribery charge, the bargain was struck, according to evidence presented by the District Attorney, long before the crimes code under which they were actually charged and indicted became effective. That's one of the grounds we took the appeal on; however, when it comes to sentencing I think it makes a big difference as to what law they should have been charged under.

THE COURT: I can tell you that on the bribery and conspiracy I have given some thought to it and I am going to impose the penalty that existed under the penal code so you need not present that.

MR. GEPHART: All right, Sir.

I also raised in argument and I would raise again for sentencing purposes the argument as to the merger of the conspiracy into the bribery.

THE COURT: Well, I have given a bit of thought to that but I think that the sentence will reflect that. I realize the nature of these crimes, these are so called white collar crimes and as in most cases the people who are involved do not have any prior records. The presentence investigation does show that. As you must know yourself the Court has given a great deal of consideration as to what the proper sentence would be. It is still important for the Court to impose a sentence which the Court regards as commensurate with the extent of the illegal act and the Jury has determined that these people are guilty. So, you

have a situation which involved a fraud against the Commonwealth and an extraordinary large amount of money. There is no doubt about it.

I was just going to say that most of the time, in fact I think now we are required to give our reasons for sentences and I think that the Supreme Court in their wisdom thought in terms of rehabilitation. In a situation such as this type a prison term would serve little purpose if rehabilitation was considered. The other factors have to enter into sentencing and obviously here you are dealing with deterrents and punishment rather than rehabilitation.

I might also say that as part of my nature and I am sure the other Judges are the same, we have great compassion for both the family of Mr. Ohle and Mr. Jackson; however, we also have a duty and responsibility not only in this case but all cases to serve not only in Dauphin County but indeed the entire State.

So, that is what the Court is faced with and we are prepared to impose the sentence unless there is something more to be said.

MR. GEPHART: Just one additional remark, if I could. The Court is aware that there were plea bargain arrangements which were subsequently reduced to writing.

THE COURT: I know there were plea bargain arrangements but I was not aware of all the details. Obviously it was part of your argument and in fact it was even set forth in your brief, but for some reason or another the plea bargain did not work out.

MR. LEWIS: That's correct.

THE COURT: I am not sure but there was at least some indication that the State would not agree and so whatever happened the plea bargain was not carried out. I never did acquaint myself with the details.

MR. GEPHART: The Defendants were willing to enter into this plea bargain arrangement so they could avoid exactly what subsequently happened, which was two major protracted trials, in which, the Court is aware, Mr. Jackson's health suffered tremendously.

THE COURT: I am not sure of the details so I could not take that into consideration.

MR. GEPHART: A lot of water has gone over the dam since that plea bargain arrangement and I think these men have suffered tremendously. Frankly, I think all of this would have been over with if the plea bargain had gone through. As a result of this the families have suffered. I don't know if the Court is aware that one of the daughters has been undergoing psychiatric treatment as a direct result of this.

We are talking about rehabilitation and we are also talking about punishment, my only question is how much punishment.

THE COURT: We are not talking about rehabilitation. You just cannot accept that in white collar crime, if you do nobody would be sent to jail.

MR. GEPHART: How much punishment can the State exact. These men are still prepared and willing to come forward and testify in the civil litigation up in Commonwealth Court, for the Commonwealth. We indicated that during argument.

THE COURT: You are bringing up something that while the Court certainly is aware of because it was in your argument and indeed I remember at one point it was brought up during trial, I must honestly say that I don't know the status of the civil matter in front of the Commonwealth.

MR. GEPHART: It is pending—

MR. LEWIS: We have not been informed.

MR. GEPHART: It is pending until the disposal of the criminal cases. They are Commonwealth witnesses and they were witnessess for the United States against Frank Hilton. Because of their testimony, they made the connection between the money going from Trucco into Hilton's pocket and as a result Frank Hilton was convicted. We would advise the Court that Mr. Hilton was tried twice and I think it is important when you consider punishment of these two men, that he was tried in Pittsburgh and he was sentenced in Pittsburgh to a term of five years with a provision by the sentencing Judge that he should serve one year.

In Scranton Mr. Hilton was offered a plea bargain by the United States Attorney which would have resulted in an identical sentence for him. If he would plead guilty in Scranton in front of Judge Nealon he would have gone to Allenwood Penitentiary

and be released in one year. Mr. Hilton elected to take a jury trial in front of Judge Nealon. He was found guilty, again largely because of the testimony of these two men. Judge Nealon imposed a concurrent sentence, five year sentence but without that one year provision.

Now, the net worth of that in the Federal area would be that Mr. Hilton, unless his health fails, would serve approximately twenty months, and he was the key man.

Mr. Hilton was the man who set this whole thing into motion.

Mr. Trucco will never serve and never has served a day in prison. Now we have two men that were approached in New York—

THE COURT: I will admit that that is good argument but it seems to me that that is not argument I should hear.

MR. LEWIS: Your Honor, just to make sure the record is clear. The charges that Mr. Hilton and Mr. Trucco faced involved a bribery and conspiracy kickback scheme which is involved in this particular case as well; however, additionally there is a theft of a large amount of money of State premiums which to this date is still missing.

THE COURT: I want to see the informations. The amount I have down is 609,000.00. I want to make sure the information reads that way.

The information indicates $800,000.00. My figure is $609,000.00, is that correct.

MR. LEWIS: Yes, that was the testimony at trial.

MR. GEPHART: Your Honor, I would say that these gentlemen paid federal income taxes on every dime including the kickback money that was allegedly paid to Mr. Trucco. It is far less than $609,000.00.

THE COURT: I am using that as my basis for restitution. If it is incorrect I am sure that the State will certainly not require you to pay back more than what is due them.

In connection with the charge of theft by failure to make required disposition of funds received, filed to 1174 Criminal Division 1975, the sentence of the Court is as follows:

And now, April 21, 1978, the sentence of the Court is that the Defendant pay a fine of $1,000.00, the costs of prosecution and that he undergo confinement in a State Correctional Institution for a term of not less than three years and no more than seven years. The Sheriff of Dauphin County is directed to deliver the defendant to the Correctional, Diagnostic and Classification Center at Camp Hill, wherein he shall be diagnosed and classified for confinement in such State penal and correctional institution as the Deputy Commissioner of Corrections shall designate, as provided by law.

In addition thereto the Defendant shall make restitution to the Commonwealth of Pennsylvania in the amount of $304,500.00.

In connection with the charge of conspiracy filed to 1173 Criminal Division 1975, the sentence of the Court is as follows:

And now, April 21, 1978, the sentence of the Court is that the Defendant pay a fine of $500.00, the costs of prosecution and that he undergo confinement in a State Correctional Institution for a term of not less than one year and no more than two years to begin and be computed from the expiration of the term imposed in 1174 Criminal Division 1975.

In connection with the charge of bribery filed to 1171 Criminal division 1975 the sentence of the Court is as follows:

And now, April 21, 1978, the sentence of the Court is that the Defendant pay a fine of $500.00, the costs of prosecution and that he undergo confinement in a State Correctional Institution for a term of not less than six months and no more than one year. This sentence shall run concurrently with the sentence imposed in 1173 Criminal Division 1975.

In connection with the charge of failure to make required disposition of funds received filed to 1179 Criminal Division 1975 against Ronald J. Jackson, the sentence of the Court is as follows:

And now, April 21, 1978, the sentence of the Court is that the Defendant pay a fine of $1,000.00, the costs of prosecution and that he undergo confinement in a State Correctional Institution for a term of not less than three years and no more than seven years. The Sheriff of Dauphin County is directed to deliver

the defendant to the Correctional, Diagnostic and Classification Center at Camp Hill, wherein he shall be diagnosed and classified for confinement in such State penal and correctional institution as the Deputy Commisioner of Corrections shall designate, as provided by law.

In addition thereto the Defendant, Ronald J. Jackson, shall make restitution to the Commonwealth of Pennsylvania in the amount of $304,500.00.

All right, gentlemen, we have now imposed sentencing against you Mr. Ohle, and you, Mr. Jackson. Both of you still have certain rights. You have a right to take appeals from the imposition of these sentences. If you take your appeal or appeals you must do so within thirty days from this date. Do you understand that, Mr. Ohle?

DEFENDANT OHLE: Yes.

THE COURT: Do you understand that, Mr. Jackson?

DEFENDANT JACKSON: Yes.

THE COURT: If you take your appeal or appeals you must do so within thirty days, as I have said. If you do not have funds of your own you have the right to be represented by and Attorney appointed by the Court free of charge. Do you understand that, Mr. Ohle?

DEFENDANT OHLE: Yes.

THE COURT: Do you understand that Mr. Jackson?

DEFENDANT JACKSON: Yes, sir.

MR. GEPHART: Your Honor, at this time I would address myself to the continuation of bail. If Mr. Jackson and Mr. Ohle do take appeals I would ask the Court to continue them on bail which is ten thousand dollars apiece. Your Honor, these men have appeared each and every time that they were called by the Court and will appear in the future.

I know that in crimes of violence it is customary for the Court to increase bail. This is, as the Court stated, a white collar crime. At the present time these men are impecunious, to impose additional bail would be a hardship which they well might not be able to meet.

MR. LEWIS: Your Honor, the Commonwealth feels that at this stage of the proceedings the bail is within Your Honor's

discretion. The Commonwealth does recognize that there are substantial appellate issues in this particular case so we are not going to make an objection to Your Honor setting bail; however, we would only ask that if bail is set that it be increased substantially, perhaps doubled or whatever figure the Court feels proper.

THE COURT: I don't think that these people are going to run away. I do think that we should increase the bail and in fact I indicated to Counsel that something in the way of bail increase should be involved and I have given it some consideration. I am going to reset bail at fifteen thousand.

(Whereupon the proceedings were concluded.)

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.

Nativa M. Pasqualini
Official Court Reporter

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

/s/ WILLIAM W. LIPSITT
William W. Lipsitt, J.

Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984
No. 85-892 (3)

CHARLES W. OHLE
and
RONALD J. JACKSON,
Petitioners

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION SEEKING WRIT OF CERTIORARI

RICHARD A. LEWIS
District Attorney
KATHERENE HOLTZINGER-CONNER
Deputy District Attorney
Attorneys for Respondent

Dauphin County Court House
Harrisburg, Pennsylvania 17101
(717) 255-2770

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54 pp

IN THE SUPREME COURT
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October Term, 1984
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District Attorney
KATHERENE HOLTZINGER-CONNER
Deputy District Attorney
Attorneys for Respondent

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Harrisburg, Pennsylvania 17101
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Appendix A: Opinion of the Supreme Court of Pennsylvania [Commonwealth v. Ohle, 503 Pa. 566, 470 A. 2d 61 (1983)]

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Commonwealth v. Ohle, ___ Pa. Super. ___, ___ A. 2d ___, (Memorandum Opinion dated March 8, 1985) 1, 11

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OPINIONS BELOW

The opinion of the trial court is reported at 100 Dauphin County Reporter 95 (1978).

The first Pennsylvania Superior Court decision is reported as Commonwealth v. Ohle, 291 Pa. Superior Court 110, 435 A. 2d 592 (1981).

The Pennsylvania Supreme Court decision is reported as Commonwealth v. Ohle, 503 Pa. 566, 470 A. 2d 61 (1983).

The subsequent opinion of the Pennsylvania Superior Court is a memorandum opinion and is unreported. Commonwealth v. Ohle, ___ Pa. Super. ___, ___ A. 2d ___ (Memorandum Opinion dated March 8, 1985). The denial of the Petition for Allocatur is also unreported.

JURISDICTION

Petitioner alleges that they seek certiorari pursuant to 28 U.S.C. §1254(i); however, this case has never been in the federal district or circuit courts. Ostensibly, Petitioners are seeking jurisdiction pursuant to 28 U.S.C. §1257(3) which addresses Writs of Certiorari from a state's highest court. Because a federal constitutional question has never been raised prior to the instant Writ of Certiorari, the Commonwealth respectfully submits that this Honorable Court should not entertain jurisdiciton of Petitioners' Writ of Certiorari.

STATEMENT OF REASONS IN OPPOSITION TO WRIT OF CERTIORARI

A. THIS HONORABLE COURT SHOULD DECLINE TO REVIEW A CASE DECIDED SOLELY ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

COUNTER-STATEMENT OF THE CASE

Two juries in Dauphin County, Harrisburg, Pennsylvania, rendered guilty verdicts in two different cases, finding evidence of wrongdoing by two persons in dealings with at least two public officials at a high level in state government.

In the first, the Petitioners, Charles W. Ohle and Ronald J. Jackson, were charged with three counts of theft by failure to make required disposition of funds received. The alleged thefts dealt with premium money paid on the Commonwealth of Pennsylvania policy covering the state automobile fleet, affecting approximately 25,000 vehicles, to the Reserve Insurance Company of Chicago, Illinois, through Charles W. Ohle, Inc., the broker for said policy. Charles W. Ohle and Ronald J. Jackson were the principals of Charles W. Ohle, Inc. Ohle was a resident of New York

and Jackson was a resident of New Jersey. The policy period ran from July 1, 1972, to June 30, 1975. The premium involved was $1,015,000.00. The Commonwealth alleged and produced testimony showing that on July 25, 1974, a Commonwealth check in the amount of $500,000.00 payable to Market Facilities, Inc., was delivered to an agent of Charles W. Ohle, Inc. Further, a check dated August 5, 1974 in the amount of $300,000.00 payable to Market Facilities and Charles W. Ohle, Inc., was also delivered to the brokers. Again, a check dated September 26, 1975, in the amount of $215,000.00 payable to Market Facilities and Charles W. Ohle, Inc., was also delivered to the brokers.

Reserve Insurance Company only received one payment from Charles W. Ohle, Inc., for the policy. The other payments on the premium account were never made. The premium money still owing to Reserve Insurance Company,

taking into consideration that one payment had been made and also allowing for the commission which would ordinarily have gone to the brokers, was approximately $609,000.00.

In the second trial, the Pennsylvania Department of Justice filed additional charges of bribery and conspiracy against Charles W. Ohle and Ronald J. Jackson. These charges alleged and the testimony produced showed that from February, 1973, through September, 1974, Ohle and Jackson made kickback payments totaling approximately $176,000.00 to Frank Hilton and Anthony Trucco. At the time, Hilton was the Secretary of Property and Supplies for the Commonwealth of Pennsylvania, and Trucco was head of the Insurance Division within the said department. The kickbacks were made in consideration for the appointment of Charles W. Ohle, Inc., as the broker for the lucrative automobile fleet insurance policy, the same policy involved in the theft charges.

It should be noted that the broker's commission for the automobile fleet policy was 20% of the premium. During this time, it was required by Pennsylvania law that approximately 7% of the premium be paid to the Secretary of Property and Supplies for benefit of the Pennsylvania Higher Education Assistance Agency. This was true for every Commonwealth insurance policy. A broker would receive 13% commission, and the other 7% would be legally paid to the PHEAA through the Secretary of Property and Supplies. In the instant case, the 7% was properly paid by the broker to the PHEAA, but an additional sum of money (6%) was paid back to Trucco and Hilton as consideration for appointing Ohle, Inc., broker for the policy. Charles W. Ohle, Inc., was making 7% commission instead of 13%.

By way of further background, the testimony revealed that Trucco met with Petitioner Ohle in New York City in February

of 1973 at the request of Hilton for the purpose of arranging to have Charles W. Ohle, Inc., a New York insurance firm, become the broker of record on the insurance policy. The discussion involved the quid pro quo expected and an agreement having been reached, Charles W. Ohle, Inc., was made broker of record in April, 1973. Although the checks were co-payable as mentioned previously, the Petitioners were purportedly authorized by the insurance company to endorse and deposit the checks into the Charles W. Ohle, Inc., bank account.

On January 16, 1975, the Reserve Insurance Company notified the Commonwealth that its policy would be cancelled effective January 27, 1975, for nonpayment of premium monies due and a suit is pending by the insurance company against the Commonwealth demanding payment of the unpaid premium.

The record in these cases also shows that on February 11, 1975, the United States District Court granted immunity to the Petitioners in connection with their testimony in related prosecutions. The District Attorney of Dauphin County was notified of this immunity and advised to seal any and all evidence in connection with the crimes of bribery and conspiracy. The District Attorney filed an application to place the evidence under seal and obtained a court order on April 1, 1975, when the criminal complaints were filed against Petitioners.

There were numerous pre-trial motions filed as well as various motions, including demurrers during the course of the trials. Both Petitioners were found guilty of theft by failure to make required disposition of funds received. During the trial on the bribery and conspiracy cases, the Petitioner, Ronald J. Jackson, became ill and a mistrial was

declared on motion of Jackson. The Petitioner, Ohle, was found guilty by the jury of both bribery and conspiracy.

The post-trial motions in both cases were argued together before the lower court en banc.

An appeal was filed with the Superior Court. By Order dated September 25, 1981, the Order of the Dauphin County Court of Common Pleas was reversed by the Superior Court. Commonwealth v. Ohle and Jackson, 291 Pa. Superior Court 110, 435 A. 2d 592 (1981). The Commonwealth petitioned for allocatur and the Pennsylvania Supreme Court accepted the case for purposes of discretionary appellate review. Commonwealth v. Ohle, 503 Pa. 566, 470 A. 2d 61 (1983). The Supreme Court reversed the Superior Court and remanded the case to the Superior Court for disposition of the remaining issues. Commonwealth v. Ohle and Jackson, 503 Pa. 566, 470 A. 2d 61 (1983).

The Superior Court addressed the remaining issues and affirmed the trial court. Commonwealth v. Ohle and Jackson, ___ Pa. Super. ___, ___ A. 2d ___ (Memorandum Opinion filed March 8, 1985; 00103 March, 1978; 00106 March 1978; 00119 March 1979).

Petitioners filed a Petition for Allocatur to the Pennsylvania Supreme Court which was denied. The instant petition for Writ of Certiorari followed.

STATEMENT OF REASONS FOR DENYING THE WRIT

The Commonwealth respectfully submits that this is not a case which should invoke discretionary review. Petitioners' convictions have been based on adequate and independent state law. The federal constitutional issue regarding due process and ex post facto considerations appears for the first time in this court.

Section 1257 regarding jurisdiction of this court states in pertinent part the following:

> §1257. State Courts; Appeal; certiorari.
>
> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution,

> treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of or commission held or authority exercised under the United States.

28 U.S.C. §1257(3).

It is axiomatic that the presence of a federal question is the sine qua non of appellate review by this Honorable Court over a state court. Henry v. Mississippi, 379 U.S. 443, 85 S. Ct. 564 (1965); Martin v. Hunters Lessee, 1 Wheat 304, 4 L. Ed. 97 (US 1816). Litigants seeking review by this Honorable Court must first present the federal issue in the appropriate state court forums. This court need not address constitutional issues which are raised for the first time in this court. Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, rehearing denied ___ U.S. ___, 104 S. Ct. 33 (1983); Cardinale v. Louisiana, 394 U.S. 437, 89 S. Ct. 1162 (Louisiana 1969).

Instantly, Petitioners did not advance constitutional issues in Pennsylvania appellate courts and the decisions of the Pennsylvania appellate courts are based on independent state law.

Following Petitioners' convictions in 1977 in the Dauphin County Court of Common Pleas, Harrisburg, Pennsylvania, the issues before the Superior Court of Pennsylvania were, inter alia, whether the Petitioners could be tried under the Pennsylvania Code for bribery, when many of the illegal acts occurred prior to the 1973 enactment of the Crimes Code when the 1939 Penal Code was still in effect. Additionally, the Superior Court addressed the issue of whether a jury instruction on the insurance law of New York should have been submitted to the jury. The Pennsylvania Superior Court reversed on both issues; Commonwealth v. Ohle, 291 Pa. Super. 110, 435 A. 2d 592 (1982). The Pennsylvania

Supreme Court reversed Pennsylvania Superior Court; Commonwealth v. Ohle and Jackson, 503 Pa. 566, 470 A. 2d 61 (1983); and held that the Petitioners were adequately "noticed" of the charges against them and the proposed jury instructions were correctly withheld from the jury instructions. As is readily apparent from the state court opinions, the issues are lacking in constitutional magnitude, because they were never raised or addressed as federal constitutional issues to the Pennsylvania courts. Petitioners' apparent ex post facto and due process argument appears for the first time before this court. Accordingly, this Honorable Court need not accept the case to review an issue raised for the first time in this court. Cardinale v. Louisiana, supra.

Even assuming this court were to overlook the fact that the issues presently before this court have never been raised before, Petitioners' intertwined due process and ex

post facto arguments are wholly lacking in merit.

The central consideration in a procedural due process analysis is to determine whether the parties affected were given notice and the opportunity to be heard. Parham v. Cortest, 407 U.S. 67, 92 S. Ct. 1983 (1972), rehearing denied 409 U.S. 902, 93 S. Ct. 180 (1972); Matthews v. Eldridge, 424 U.S. 319, 46 S. Ct. 393 (1976). An ex post facto law is one in which the state imposes a punishment for an act which was not punishable when it was committed, or imposes additional punishment or changes the rules of evidence by which less or different testimony is sufficient to convict. It is the effect not the form of the law which is determinative. Dobbert v. Florida, 432 U.S. 287, 97 S. Ct. 2290, rehearing denied 434 U.S. 882, 98 S. Ct. 246 (1977); Calder v. Bull, 3 U.S. 386, 1 L. Ed. 648 (1798).

Turning to the case at bar, Petitioners, as insurance brokers, bribed Frank Hilton who at the time was Secretary of Property and Supplies for the Commonwealth of Pennsylvania. In exchange for the bribe, Petitioners became the brokers for the insurance policy covering all of the Commonwealth vehicles. In 1976, premiums of $1,015,000.00 were forwarded to Petitioners; of that, one premium payment of $215,000.00 was paid to the insurance company; the commission of $215,000.00 was rightfully Petitioners as their brokerage fees; and the remaining money which was more than $600,000.00 was withheld by Petitioners and never paid to the insurance company.

The bribery acts for which Petitioners were criminally charged occurred from approximately February, 1973, until September, 1974. During that same time, Pennsylvania re-enacted its criminal laws from the Penal Code

of 1939 to the Crimes Code of 1973.[1]

Bribery and Theft by Failure to Make Required Disposition of Funds were criminal under both.[2] The Crimes Code section on bribery, however, deleted an affirmative defense under the Penal Code section for bribery and upgraded the offense to a felony. 18 Pa. C.S.A. §4701 (1973); 18 P.S. §4303 (1939).

Petitioner's were charged under the 1973 Crimes Code; the criminal informations charging Petitioners paraphrased the language of both the Penal Code and the Crimes Code.

---

[1] The Crimes Code became effective to those criminal acts occurring after June 6, 1973. Act of December 6, 1972, P.L. 1482, No. 334 §2.

[2] Under the Penal Code, Theft by Failure to Make Required Disposition of Funds Received was generally categorized as Larceny, 18 P.S. §4808, and specifically categorized as Fraudulent Conversion of Property, 18 P.S. §4834. Because the actual crime was committed after the operative date of the 1973 Crimes code, there was never an issue regarding the applicability of the Penal Code.

Following Petitioners' convictions, they were sentenced pursuant to the Penal Code.

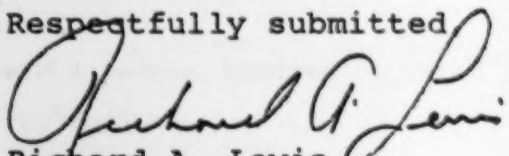
Petitioners' convictions for bribery and theft by failure to make the required disposition of funds are not violative of either due process or ex post facto considerations. As the Pennsylvania Supreme Court noted, the criminal information notified Petitioners of the charges by paraphrasing the language of both the 1939 Penal Code and the 1973 Crimes Code. Commonwealth v. Ohle, 503 Pa. at 584, 470 A. 2d at 70-71 (1983). Moreover, Petitioners were not deprived of a defense since the defense did not exist under either the Penal Code or the Crimes Code. Commonwealth v. Ohle, 503 Pa. 586-587, 470 A. 2d at 72 (1983). Finally, Petitioners were sentenced pursuant to the 1939 Penal Code provisions. Commonwealth v. Ohle, 503 Pa. 572, 470 A. 2d 64 (1983). Accordingly, even assuming this court were to address

Petitioner's constitutional issues, the issues do not warrant discretionary review by this Honorable Court.

CONCLUSION

WHEREFORE, the Commonwealth respectfully requests this Honorable Court to deny Petitioners' request for Writ of Certiorari.

Respectfully submitted



Richard A. Lewis
District Attorney
Dauphin County

Appendix A

470 A.2d 61

COMMONWEALTH of Pennsylvania, Appellant,

v.

Charles W. OHLE and Ronald J. Jackson, Appellees.

Supreme Court of Pennsylvania.

Argued May 27, 1983.

Decided Dec. 14, 1983.

Defendants were convicted in the Court of Common Pleas of Dauphin County, Criminal Division, Nos. 1171, 1173, 1174, 1179 C.D. 1975, William W. Lipsitt, J., of theft, and one defendant was also convicted of bribery and conspiracy, and they appealed. The Superior Court, Nos. 103 and 106 March Term 1978 and No. 119 March Term 1979, 291 Pa.Super. 110, 435 A.2d 592, granted defendants a new

trial on theft charges, and quashed additional indictments for bribery and conspiracy, and the Commonwealth appealed. The Supreme Court, No. 4 M.D. Appeals Dk. 1982, Hutchinson, J., held that: (1) issue whether defendants, officers of a New York insurance brokerage firm, committed theft by failure to make required disposition of funds to an insurance carrier which underwrote an auto fleet policy for the Commonwealth of Pennsylvania, was dependent upon criminal law of Pennsylvania, rather than civil law of New York, even though alleged failure occurred in New York, and it was thus irrelevant whether such failure was illegal under New York civil law governing insurance brokers, so that there was no error in refusing request to charge jury on various aspects of New York insurance law, and (2) indictment charging bribery in official and political matters and conspiracy to commit bribery in connection therewith, though couched in language of the otherwise inapplicable Crimes Code, nevertheless included all effectual elements included in the applicable Penal Code and, hence, was not defective.

Vacated and remanded.

Roberts, C.J., and McDermott, J., concurred in the result.

1. Embezzlement ⇐10

The issue of whether payment to a faithless agent is the same as payment to his principal, relevant in a civil action between the principal and a third party, is irrelevant to the determination of whether that faithless agent acted criminally in withholding funds due his principal. 18 Pa.C.S.A. § 3927.

2. Criminal Law ⇐83

The issue of a court's jurisdiction, its power to hear and decide a criminal case, should not be separated from conflicts principles arguably affecting that power and, hence, should not be separated from such choice of law influencing considerations as predictability of results, interstate orderli-

ness in the law's administration, and advancement of the forum's governmental interests.

3. Action ⇐17

The question of jurisdiction and that of the governing substantive law always receive the same answer and, if the forum court has jurisdiction, the governing law is always that of the forum state.

4. Embezzlement ⇐48(1)

Issue whether defendants, officers of a New York insurance brokerage firm, committed theft by failure to make required disposition of funds to an insurance carrier which underwrote an auto fleet policy for the Commonwealth of Pennsylvania, was dependent upon criminal law of Pennsylvania, rather than civil law of New York, even though alleged failure occurred in New York, and it was thus irrelevant whether such failure was illegal under New York civil law governing insurance brokers, so that there was no error in refusing request to charge jury on various aspects of New York insurance law. 18 Pa.C.S.A. § 3927.

5. Courts ⇐95(1)

A criminal court in one state may apply the substantive law of a criminal court in another state as long as it is the appropriate criminal law and not its civil law.

6. Principal and Agent ⇐2

Agency principles of the New York civil law of insurance could not be transformed into criminal law principles binding in the Pennsylvania prosecution on charging defendants, officers of New York insurance brokerage firm, with theft by failure to make required disposition of funds to the insurance carrier which underwrote an auto fleet policy for the Commonwealth of Pennsylvania. 18 Pa.C.S.A. § 3927.

7. Embezzlement ⇐11(1)

Theft by failure to make a required disposition of funds requires the obtaining of property of another, an agreement or known legal obligation upon the receipt to make specified payments or other disposition thereof, an intentional dealing

with the property obtained as one's own, and a failure to make the required disposition of the property. 18 Pa.C.S.A. § 3927.

8. Embezzlement ⇐48(1)

Once the trial court determined that it had jurisdiction in prosecution charging the defendants, officers of a New York insurance brokerage firm, with theft by failure to make required disposition of funds to the insurance carrier which underwrote an automobile policy for the Commonwealth of Pennsylvania, the trial court acted correctly in refusing the instructions on New York civil law which the defendants requested and in asking the jury to determine whether the defendants' actions involved all four of the elements Pennsylvania law required before imposing criminal liability upon the defendants. 18 Pa.C.S.A. § 3927.

9. Criminal Law ⇐805(1), 833

A trial court has broad discretion in phrasing its points for charge and is not bound to give instructions in the form requested particularly where that form does not reflect a correct interpretation of the law.

10. Criminal Law ⇐833

A trial court need not accept counsel's wording for an instruction, but may choose its own so long as the area is adequately, accurately and clearly presented to the jury for their consideration.

11. Criminal Law ⇐822(1)

An appellate evaluation of a jury instruction must be based on an examination of the instruction as a whole to determine whether it was fair or prejudicial.

12. Embezzlement ⇐48(1)

In prosecution charging defendants, officers of a New York insurance brokerage firm, with theft by failure to make required disposition of funds to the insurance carrier which underwrote an auto fleet policy for the Commonwealth of Pennsylvania, the trial court properly instructed the jury on all the relevant legal issues, including its jurisdiction and defendant's contention that the money was

promptly disposed of, at least insofar as the legal obligation between the brokers and the Commonwealth was concerned. 18 Pa.C.S.A. § 3927.

13. Criminal Law ⇐13.2

The defendant, charged with bribery in official and political matters and with conspiracy to commit bribery in connection therewith, could not have been properly convicted under the Crimes Code when elements of both bribery and conspiracy occurred prior to effective date of the Crimes Code, and it was thus necessary for the conviction to be under the Penal Code pursuant to the savings clause language contained in the Crimes Code. 18 Pa.C.S.A. § 4701.

14. Indictment and Information ⇐108

Indictment charging bribery in official and political matters and conspiracy to commit bribery in connection therewith, though couched in language of the otherwise inapplicable Crimes Code, nevertheless included all effectual elements included in the applicable Penal Code and, hence, was not defective. 18 Pa.C.S.A. § 4701.

15. Bribery ⇐3
Conspiracy ⇐11

The affirmative defense of impossibility would not have been available to the defendants in prosecution charging bribery and conspiracy under either the Crimes Code or the Penal Code and, hence, was not erroneously overlooked because of the misleading use of the Crimes Code language in the indictment; the impossibility, which arises from the act the offeror assumes is prohibited is not illegal, would not have been available because the wording of the insurance contract by a state official in consideration of private gain was plainly illegal. 18 Pa.C.S.A. § 4701.

16. Indictment and Information ⇐137(6)

Indictments charging bribery and conspiracy should not have been quashed merely because an inapplicable defense under the Crimes Code was arguably precluded by the indictment where the defendants were charged alternately

under both the Crimes Code and the Penal Code in the initial criminal complaint and the trial court required the jury to find all the elements in the Penal Code. 18 Pa.C.S.A. § 4701.

17. Indictment and Information ⇐71.2(2, 4)

The purpose of the indictment is to provide the accused with sufficient notice to prepare a defense and to insure that he will not be tried twice for the same act.

18. Indictment and Information ⇐171

A variance is not fatal unless it could mislead the defendant at trial, involves an element of surprise prejudicial to the defendant's efforts to prepare his defense, precludes the defendant from anticipating the prosecution's proof, or impairs a substantial right.

Richard A. Lewis, Dist. Atty., William A. Behe, Deputy Dist. Atty., Katherene Holtzinger, Harrisburg, for appellant.

Smith B. Gephart, Harrisburg, for appellees.

Before ROBERTS, C.J., and LARSEN, FLAHERTY, McDERMOTT, HUTCHINSON and ZAPPALA, JJ.

OPINION OF THE COURT

HUTCHINSON, Justice.

The Commonwealth appeals by allowance Superior Court's orders reversing judgments of sentence Dauphin County Common Pleas imposed on appellees. Superior Court granted appellees a new trial after a jury convicted them of theft, and quashed additional indictments against appellee Ohle for bribery and conspiracy.[1] All these arose out of a kickback scheme involving Pennsylvania's former Secretary of Property and Supplies, Frank Hilton, who had the power to enter into insurance contracts on behalf of the

1. Bribery and conspiracy charges against Jackson were not before Superior Court, but remain pending after a mistrial.

Commonwealth. We vacate Superior Court's order and remand this record to it for further proceedings consistent with this opinion.

I

Appellees Charles W. Ohle and Ronald J. Jackson, officers of a New York insurance brokerage firm, were charged with three counts of theft by failure to make required disposition of funds to the insurance carrier which underwrote an auto fleet policy for the Commonwealth of Pennsylvania; bribery in official and political matters, and conspiracy to commit bribery in connection therewith. All these charges arose out of their participation in the Hilton kickback scheme.

In June of 1977, they were tried jointly on the theft charges and convicted. In November, 1977, a joint trial on the bribery and conspiracy charges began. Jackson became ill and a mistrial was declared as to these charges against him. *See supra* n. 1. Ohle's trial continued. He was convicted of both bribery and conspiracy.

On the theft charges the trial court sentenced Ohle and Jackson to pay a fine of $1,000 and the costs of prosecution, to make restitution of $304,500 each to the Commonwealth and to terms of three to five years imprisonment. Ohle was also sentenced to pay a fine and serve a term of one to two years, concurrent with the theft sentence on the conspiracy charge; for bribery he received a $500 fine and six months to one year in prison, concurrent with his sentences for theft and conspiracy. All sentences were under our former Penal Code.

Both Ohle and Jackson filed post-trial motions for new trials and in arrest of judgment. Dauphin County Common Pleas heard and denied them *en banc*. 100 Dauph. 95 (1978). They appealed to Superior Court. It reversed the theft convictions of both and remanded those cases for a new trial. It not only reversed Ohle's convictions for bribery and conspiracy, but also quashed the indictments on these charges. 291 Pa.Superior Ct. 110, 435 A.2d 592

(1981). It determined he was improperly indicted under our present Crimes Code because elements of both crimes occurred before its effective date, and an "affirmative defense" to a charge of bribery, available under the Penal Code, was not available under the Crimes Code.[2]

Superior Court held that the trial court had jurisdiction to hear the theft charges despite the fact that the inaction which Pennsylvania would consider a failure to make required disposition of funds occurred in New York. Nevertheless, it also held that Common Pleas erred in refusing appellees' requests to charge the jury on various aspects of New York insurance law and by failing to direct the jury to find appellees not guilty if their failure to remit to the insurance carrier was not illegal under New York civil law governing insurance brokers.

For the reasons which follow, we vacate these orders of Superior Court and remand to it for disposition of the remaining issues, consideration of which was unnecessary under the orders we now vacate.[3]

II

The factual background of this case, while involved, is not in dispute. The thefts involved premiums of more than one million dollars for the Commonwealth's insurance policy

2. The Crimes Code, Act of December 6, 1972, P.L. 1482, effective June 6, 1973, 18 Pa.C.S. § 101 *et seq.*, replaced the Penal Code, June 24, 1939, P.L. 872.

3. Because of its determination of the jury charge and indictment issues, Superior Court did not address other allegations of trial error made by appellees. These issues are: (1) failure of the trial court to grant a mistrial after revealing its decision to deny appellees' demurrer to the evidence to the news media, which report was read by several jurors; (2) refusal of the trial court to dismiss the conspiracy charge on grounds of merger; (3) refusal of the trial court to dismiss the bribery and conspiracy charges because only uncorroborated testimony of accomplices was introduced; (4) refusal of the trial court to grant a mistrial based on a Commonwealth witness's reference to appellee's prior criminal record. (The last three allegations of error apply only to appellee Ohle). Based on our resolution of the Commonwealth's appeal, we remand these issues to Superior Court so that it may properly determine their merits.

covering its automobile fleet. These were due the Reserve Insurance Company of Chicago, Illinois (Reserve), through Charles W. Ohle, Inc., a New York brokerage firm. Defendants were the principals of that broker. Ohle is a resident of New York and Jackson is a resident of New Jersey. On July 25, 1974 a Commonwealth premium check for $500,000.00 payable to Market Facilities, Inc., a subsidiary of Reserve, and Charles W. Ohle, Inc., the broker, was delivered to the latter. On August 5, 1974 a second check for $300,000.00 payable to the same Reserve subsidiary and Charles W. Ohle, Inc. was also delivered to it. Finally, on September 26, 1974 a check for $215,000.00 payable to the same payees was also delivered to Charles W. Ohle, Inc.

Defendants caused these payments to be deposited in the brokerage firm's account without the other payee's endorsement.[4] Then, through their control of the brokerage account, they withheld more than $600,000 admittedly due Reserve. The issue of whether the withheld funds are due Reserve was the subject of Reserve's civil action against the Commonwealth. The outcome of that action is not shown on this record.

After the theft charges were filed, our Department of Justice brought additional charges of bribery and conspiracy against defendants. These were the subject of the second trial. The testimony produced showed that from February, 1973 through September, 1974 defendants made kickback payments totalling approximately $176,000.00 to Frank Hilton and Anthony Trucco. Hilton was then Secretary of Property and Supplies for the Commonwealth of Pennsylvania. Trucco was the Director of that Department's Insurance Division. The kickbacks were in consideration of Hilton's appointment of Charles W. Ohle, Inc. as broker for the automobile fleet insurance policy.

The discussions which led to Hilton's appointment of defendants' New York corporation as broker in considera-

4. Although the checks were co-payable as mentioned previously, the defendants were authorized by the insurance company to endorse and deposit the checks into the Charles W. Ohle, Inc. bank account.

tion of their kickback agreement began in February, 1973, before the effective date of our Crimes Code, *see supra* at n. 2, when co-conspirator Trucco met with defendant Ohle in New York City. At that time the crimes of bribery and conspiracy were governed by the Penal Code. Nevertheless, the indictments used the language of the Crimes Code in making these charges. The complaint, however, had alternatively cited both the Penal Code and Crimes Code sections.

III

Superior Court correctly held defendants indictment for the theft offense fell under the Crimes Code, rather than the Penal Code, and that Dauphin County Common Pleas had jurisdiction to hear the case.[5] However, Superior Court erred in reversing appellees' convictions and remanding for a new trial. Superior Court held the trial court erred in refusing to charge the jury on the New York civil law of insurance. Superior Court would have directed the jury to

5. Appellees do not now challenge either of these holdings. With respect to which statute applies, the transitional savings clause appended to the official version of the Crimes Code provides, in relevant part: "[f]or the purposes of this section, an offense was committed prior to the effective date of this act if any of the elements of the offense occurred prior thereto." Act of December 6, 1972, P.L. 1482, No. 334, § 2. The failure to make required disposition took place in 1974 after appellees received the premium checks. The Crimes Code was then effective. With respect to territorial jurisdiction Crimes Code Section 102(a), 18 Pa.C.S. § 102(a) provides, in relevant part:

> § 102. Territorial applicability
>
> (a) General rule.—Except as otherwise provided in this section, a person may be convicted under the law of this Commonwealth of an offense committed by his own conduct or the conduct of another for which he is legally accountable if either:
>
> (1) the conduct which is an element of the offense or the result which is such an element occurs within this Commonwealth;
>
> ....
>
> (5) the offense consists of the omission to perform a legal duty imposed by the law of this Commonwealth with respect to domicile, residence or a relationship to a person, thing or transaction in this Commonwealth;
>
> ....

Section 102 is similar to Section 103 of the Model Penal Code, discussed in Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 Case Western Res.L.Rev. 44, 60–61 (1974).

find appellees not guilty if it found New York civil law treated payment to the broker as payment to the insurance company.[6]

[1] The issue of whether payment to a faithless agent is the same as payment to his principal, relevant in a civil action between the principal and a third party, is irrelevant to the determination of whether that faithless agent acted criminally in withholding funds due his principal. In finding this issue determinative of the Commonwealth's jurisdiction, Superior Court incorrectly separated the issue of jurisdiction from those "choice of law influencing considerations beyond due process" which some commentators believe should influence the question of jurisdiction in criminal cases.[7]

[2] Both the Superior Court opinion and appellees' brief refer to this issue as a jurisdiction-related fact question. They then proceed, however, to treat it as a separate conflict of laws question on the propriety of requiring the

6. The points for charge submitted by appellees, read in part to the jury, are as follows:

> Under the law, endorsement of a check by the proper person to make such endorsement constitutes an actual and legitimate payment of an obligation. *If you find from the evidence that either Defendant had the authorization of officers of The Market Facilities, Inc. to endorse said company's name on the checks of the Commonwealth and deposit them in the bank account of Charles W. Ohle, Inc., then you must find that payment was made to the insurance company, and you must find Defendants not guilty.*
>
> Under the Insurance Law of the State of New York when an insurance company entrusts its policies to a broker for delivery to the insured, the broker acts as an agent for the insurance company in collecting and receiving premiums, and payment to the broker is deemed payment to the insurance company. *Therefore, if you find that Defendants received payment of the insurance premium from the Commonwealth of Pennsylvania, you must find that the obligation of the Commonwealth of Pennsylvania was discharged, because payment to the broker was payment to the insurer. Any subsequent failure to transmit moneys to the insurance company would not constitute a violation of the criminal statute under which Defendants are charged.*

(The emphasized portions are those sections of the submitted jury charges *not* read by the trial court).

7. *See* Leflar, *supra*, note 5.

jury to apply certain aspects of New York insurance law to this case in determining appellees' guilt. This analysis confuses the issue of the trial court's jurisdiction, *i.e.*, its power to hear and decide the case, with the conflicts principles arguably affecting that power.[8] In so doing, Superior Court misapplied the choice of law principles set forth by Professor Leflar, formerly Justice Leflar of the Arkansas Supreme Court, in Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 Case Western Res.L.Rev. 44 (1974). The Leflar article, cited by both appellees and the Commonwealth, criticizes the traditional territorial method of determining the applicable law in criminal cases and recommends instead use of certain "choice influencing" considerations suggested by the author. This choice influencing analysis goes beyond both the traditional territorial view of criminal jurisdiction and the analysis in terms of statutory construction employed in some jurisdictions. The latter two restrict jurisdiction only by due process considerations of fairness and contacts with the forum.

Whatever the analysis, jurisdiction to hear the case is the fundamental question to which conflict of laws "choice influencing" considerations are to be applied.[9] A finding that there is jurisdiction will result in the forum law's application "since the case will not be heard unless it is proposed to apply the forum's law to it." Leflar, *supra* p. 10, at ——-——. "Choice influencing" considerations will, if

8. Despite the confusion of terms in Superior Court's opinion and appellees' brief, the remand of the theft charges for a new trial indicates Superior Court concluded that Dauphin County Common Pleas had jurisdiction, and appellees do not now contest this determination. *See* Brief for Appellees at 8, where it is stated that "Superior Court correctly ordered a new trial...."

9. Leflar, *supra*, at —.
The question of jurisdiction and of choice of law combine as one question—is the forum's substantive criminal law properly applicable to the facts? A preliminary part of the question is whether federal due process requirements would be satisfied if forum law were applied. If not, the question is answered. But if due process would be satisfied, the common law part of the question remains. That is when the choice-influencing considerations should be taken into account.

applicable, allow the court to appeal to the criminal, not civil law of another state which has an interest in the case. According to Leflar, three choice influencing considerations are relevant in criminal cases. They are predictability of results, interstate orderliness in the law's administration and advancement of the forum's governmental interests. All three support the application of Pennsylvania law to this case. *See* Leflar, *supra*, at ———.

The wording offered by appellees would have improperly decided the underlying conflict of laws issue by requiring the jury to apply the civil law of New York in determining appellees' guilt, rather than the law of Pennsylvania. Appellees' submitted instructions would not only have made New York criminal law controlling in determining appellees' criminal liability in Pennsylvania, but would have made controlling the insurance law of New York and its attendant principles of agency determinative.

[3, 4] The trial court committed no error in refusing this instruction and thus applying the law of the forum, Pennsylvania. It is a basic proposition of conflict of laws in criminal cases that "the question of jurisdiction and that of governing substantive law always receive the same answer. The governing law is always that of the forum state, if the forum court has jurisdiction." *See* Leflar, *supra*, at 47.

[5, 6] *Richards v. United States*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962), cited by appellees, is not to the contrary. *Richards*, a civil case arising under the Federal Tort Claims Act, states that "where more than one state has sufficiently substantial contact with the activity in question, the forum state, ... could constitutionally apply to the decision of the case the law of one or another state having such an interest." 369 U.S. at 15, 82 S.Ct. at 594. It thus allows a court, consistent with the protection granted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, to apply the substantive law of another jurisdiction in certain cases. Such an application, however, is not mandated. Moreover, that

substantive law must be the appropriate substantive law, in this case the criminal law of New York, not its insurance law. Appellees' argument, and the wording of their proffered instructions, would transform the agency principles of New York insurance law into criminal law principles binding in this Pennsylvania prosecution. Such a result is not justified under any conflict of laws analysis.

Appellees' argument that their receipt of the premium checks as agents of Reserve Insurance Company constituted payment to Reserve is simply additional evidence of their persistent confusion of civil law agency principles with our criminal law of theft, and ignores the fact that the Commonwealth's motor fleet insurance policy was cancelled because of non-payment of premiums. Whether the Commonwealth suffered an actual loss from this cancellation is irrelevant. At the very least, appellees failed to perform their duty to transfer the premiums to Reserve, and thus also violated their legal duty under Pennsylvania law, a violation for which Pennsylvania imposes criminal sanctions. That violation substantially affected this Commonwealth's interests. It lost both the assured coverage and the defense against claims which the premium was intended to purchase. Indeed, when these charges were tried Pennsylvania was perforce litigating those issues in an action by the carrier to recover the premiums appellees had not remitted.[10]

Thus, the trial court, having jurisdiction, properly instructed the jury. It committed no error by instructing the jury on the substance of the defense put forward by appellees.

Moreover, the trial court correctly concluded appellees misstated New York insurance law. It said:

10. The outcome of that action is not relevant to these charges. When Pennsylvania remitted the premiums to cover these risks it certainly did not expect either to be relegated to a law suit in order to establish coverage, or to defend one asking it to pay again. The Commonwealth fulfilled its duty by paying the premiums to the agents. The imposition of criminal sanctions for that violation of Pennsylvania law does not preclude the Commonwealth from asserting the defense of payment in a civil suit brought by Reserve for non-payment.

The defendants rely upon the New York Insurance Law, § 121, titled "Broker authorized to receive premium, when" and *Lezak v. National Grange Mutual Insurance Co.*, 233 N.Y.S.2d 607 (Supreme Court 1962). The defendants contend Section 121 as interpreted by *Lezak* provides that payment to a broker, entrusted by the insurer with delivery of the policy to the insured, is deemed a completed payment to the insurer because the broker acts as agent for the insurer. Thus, they argue, the final element in the theft would be absent, as the defendants would not have failed to make the required disposition of the property.

This theory is faulty. The brokers are merely agents authorized to receive the premium payments but with an obligation to transmit the money to the insurer, that is to make the required disposition of the property. The parties per the insurance contract expected the premiums (net the commission) to be finally received by the insurer not the broker. Since premiums due on a policy of insurance and paid to an insurance broker for transmission to an insurance company when received by the broker become trust funds, it is the obligation of the broker, in the faithful discharge of his duty to the insured, not to intermingle such moneys with his general funds not to divert, but to keep the money separate and distinct from his own property and promptly transmit to the insurance company. 29 N.Y.Jur. Insurance § 463. *Leterman v. Pink*, [249 App.Div. 164], 291 N.Y.S. 249, 254 (Supreme Court, App.Div.1936). There is no evidence the New York legislature intended to negate the fiduciary duty of the brokers to relay the funds due to the insurer. Rather the New York legislature has codified the fiduciary capacity of the brokers for all premiums received. New York Insurance Law, § 125. *See also* 11 N.Y.C.R.R. 20.3.

100 Dauph. at 101–102.

[7, 8] As defined by Section 3927 of our Crimes Code, theft by failure to make required disposition of funds received has four elements: [11]

1. The obtaining of property of another;
2. Subject to an agreement or known legal obligation upon the receipt to make specified payments or other disposition thereof;
3. Intentional dealing with the property obtained as the defendant's own; and
4. Failure of the defendant to make the required disposition of the property.

Commonwealth v. Crafton, 240 Pa.Superior Ct. 12, 16, 367 A.2d 1092, 1094–1096 (1976). Appellees concede that the first two elements of the crime occurred in Pennsylvania and therefore the trial court possessed jurisdiction to hear and try the case. That jurisdiction, based on 18 Pa.C.S. § 102(a)(1),[12] provides for conviction "under the laws of this

11. Section 3927 of the Crimes Code, 18 Pa.C.S. § 3927, provides:
§ 3927. Theft by failure to make required disposition of funds received
(a) Offense defined.—A person who obtains property upon agreement, or subject to a known legal obligation, to make specified payments or other disposition, whether from such property or its proceeds or from his own property to be reserved in equivalent amount, is guilty of theft if he intentionally deals with the property obtained as his own and fails to make the required payment or disposition. The foregoing applies notwithstanding that it may be impossible to identify particular property as belonging to the victim at the time of the failure of the actor to make the required payment or disposition.
(b) Presumptions.—An officer or employe of the government or of a financial institution is presumed:
(1) to know any legal obligation relevant to his criminal liability under this section; and
(2) to have dealt with the property as his own if he fails to pay or account upon lawful demand, or if an audit reveals a shortage or falsification of accounts.

12. The Commonwealth argued before Superior Court that the trial court's jurisdiction could also be based on 18 Pa.C.S. § 102(a)(5). Superior Court rejected this argument, stating that it is "clear that subsection 5 was intended to reach outside the territorial limits of Pennsylvania to prosecute those who had a duty or obligation which must necessarily have been performed within our boundaries..." 291 Pa.Superior Ct. at 126, 435 A.2d at 600. Because of our determination that § 102(a)(1) is applicable, we need not decide this issue. We note, however, that the language of subsection 5 while referring to

Commonwealth" when the "conduct which is an element of the offense ... [occurs] within this Commonwealth." Once it determined that it had jurisdiction over the case the trial court correctly refused the instructions on New York civil law which appellees requested and simply asked the jury to determine whether appellees' actions involved all four of the elements Pennsylvania law requires before imposing criminal liability for the offense of theft by failure to make required disposition of funds received.

The trial court, after it determined it had jurisdiction, properly treated the issue as a question of whether the Commonwealth had proven all the substantive elements of the crime of theft.

In refusing parts of appellees' points for charge, the trial court also held that it had covered the substance of those points in other parts of its instructions to the jury. T.T. at 355–356 (June 1, 1977). We agree.

[9–11] A trial court has broad discretion in phrasing its points for charge, and is not bound to give instructions in the form requested, particularly where that form does not reflect a correct interpretation of the law. *Commonwealth v. Holland*, 480 Pa. 202, 389 A.2d 1026 (1978). Moreover, a trial court need not accept counsel's wording, but may choose its own so long as the "area is adequately, accurately and clearly presented to the jury for their consideration." *Commonwealth v. McComb*, 462 Pa. 504, 509, 341 A.2d 496, 498 (1975). Finally, an appellate evaluation of the charge must be based on an examination of it as a whole to determine whether it was fair or prejudicial. *Commonwealth v. Wortham*, 471 Pa. 243, 369 A.2d 1287 (1977).

[12] Applying these standards and reading the charge as a whole we believe that the court properly instructed the jury on all the relevant legal issues, including its jurisdiction and appellees' contention that the money was properly disposed of, at least insofar as the legal obligation between

a "legal duty imposed by the law of this Commonwealth" makes no requirement that the duty be carried out within Pennsylvania.

the brokers and the Commonwealth was concerned. The following excerpt from the court's instructions shows that the issues raised in the refused sections of appellees' proffered instructions were in fact presented to the jury, though not in the words supplied by appellees' counsel:

> Ladies and gentlemen, so much for the facts. We think that we have generally told you, in fact we think that we have specifically told you the basis for the defense. The defense says that the state did not lose anything; that the money was sent to the defendants—or, rather, the money was sent to Market Facilities and to Charles W. Ohle, Inc. in New York, that there was an endorsement that acknowledged receipt of the payment and, therefore, Reserve Insurance Company could have no claim against the Commonwealth of Pennsylvania, that if the Commonwealth did anything in the nature of the payments, the Commonwealth of Pennsylvania was acting under either a mistake or a misunderstanding.
>
> The defense asserts that no criminal act was done until the obligation to transmit the funds to the insurance company arose and was not met. Of course, it is their contention that this obligation did not arise until sometime after the money was received in New York, that up to that point nothing wrong was done, there was nothing wrong with Mr. Ram coming to Harrisburg and taking the money, that they had a right to use the money for 45 or 60 days, and if they were unable to pay that was purely a civil problem or civil action which should exist somewhere in either New York or some other state between the defendants and the Reserve Insurance Company. The Court is giving that to you for your consideration.

T.T. at 353–354 (June 1, 1977). The trial court did not refuse the substance, but only the wording of appellees' suggested charges, thus fully and accurately presenting these issues to the jury. *McComb, supra.*[13]

13. The trial court's instructions also make clear that appellees' reliance on *Commonwealth v. Bighum*, 452 Pa. 554, 307 A.2d 255 (1973)

IV

[13, 14] Appellee Ohle was also convicted of bribery and conspiracy to commit bribery as a result of the kickbacks involving Hilton and Trucco. As stated, Jackson suffered a mistrial on these charges. Superior Court not only reversed Ohle's convictions on these charges, but also quashed these indictments against him. Superior Court's threshold determination that appellee could not have been properly convicted under the Crimes Code was plainly correct. Elements of both the bribery and conspiracy did occur before its effective date. Thus, conviction had to be under the Penal Code pursuant to the savings clause language contained in Crimes Code Section 2.[14] The indictment itself was unfortunately phrased in the language of the Crimes Code. It said:

> [O]n (or about) February, 1973, through September, 1974, in said County, one Charles W. Ohle did offer, agree to confer, and confer upon another any pecuniary benefit as consideration for the decision, opinion, recommendation or other exercise of discretion of a public servant by the recipient.
>
> Other person(s): Anthony J. Trucco and Frank J. Hilton.
>
> Public servant(s): Trucco: Director, Insurance Bureau, Pennsylvania Department of Property and Supplies.
>
> Hilton: Secretary of Property and Supplies, Commonwealth of Pennsylvania.
>
> Pecuniary benefit: $176,000
>
> Action: Did confer rebates and kickbacks to Pennsylvania officials (Hilton, Trucco) which represented a portion of premiums for insurance policies purchased by the Commonwealth of Pennsylvania to influence his selection as

and *Commonwealth v. Mull*, 316 Pa. 424, 175 A. 418 (1934) is misplaced. In *Mull* the trial court failed to instruct the jury on jurisdiction where it was very much in doubt that any element of the crime (murder) had occurred in the county. In *Bighum* the facts so overwhelmingly supported the jurisdiction of the trial court it was held not to be error for the trial court not to charge on the issue of jurisdiction.

14. Act of December 6, 1972, *supra*, note 5.

broker for said policies by Frank Hilton and Anthony Trucco.

However, that indictment included all the factual elements of the Penal Code offenses.[15]

The meeting between Trucco and Ohle in New York City, an act essential to both the bribery and conspiracy charges, occurred in February, 1973. This was prior to June 6, 1973, the effective date of the Crimes Code and thus invoked the savings clause in the Crimes Code, which provides:

Section 2.

Title 18 ... as added by this act, does not apply to offenses committed prior to the effective date of this act and prosecutions for such offense shall be governed by the prior law, which is continued in effect for that pur-

15. The Crimes Code provision dealing with bribery in official and political matters, 18 Pa.C.S. § 4701, provides:

(a) Offenses defined.—A person is guilty of bribery, ... if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

(1) any pecuniary benefit as consideration for the decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter by the recipient;

(2) any benefit as consideration for the decision, vote, recommendation or other exercise of official discretion by the recipient in a judicial, administrative or legislative proceeding; or

(3) any benefit as consideration for a violation of a known legal duty as public servant or party official.

(b) Defenses prohibited.—It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, had left office, or lacked jurisdiction, or for any other reason.

The Penal Code provision, 18 P.S. § 4303, stated, in pertinent part:

§ 4303. Bribery of Governmental officers and employes; judges, jurors, etc.

Whoever shall directly or indirectly, or by means of and through any artful and dishonest device whatever, give or make any promise, contract or agreement, for the payment, delivery, or alienation of any money, goods or other thing, in order to obtain or influence the vote, opinion, verdict, award, judgment, decree, or behavior of any member of the General Assembly, or any officer or employe of this Commonwealth, or of any political subdivision thereof, or any judge, juror, justice, referee or arbitrator, in any bill, action, suit, complaint, indictment, controversy, matter or thing whatsoever, depending or which shall depend before him or them, is guilty of bribery, ...

pose, as if this act were not in force. *For the purposes of this section, an offense was committed prior to the effective date of this act if any of the elements of the offense occurred prior thereto.*

Emphasis added. Appellees' criminal responsibility must, therefore, be determined under the Penal Code. Appellees point out that the Penal Code arguably contains an affirmative defense of impossibility to the crimes of bribery and conspiracy to commit it, absent in the Crimes Code. *See* Crimes Code § 4701(b), note 15, *supra*, relating specifically to this offense, and generally *Commonwealth v. Henley*, 312 Pa.Superior Ct. 564, 459 A.2d 365 (1983) (allocatur granted September 27, 1983) (holding that Section 901(b) of the Crimes Code, 18 Pa.C.S. § 901(b), abrogates the defense of legal impossibility for all crimes).

[15] Appellees' argument, that the affirmative defense of impossibility would have been available to him under the Penal Code, but was overlooked because of the misleading use of Crimes Code language in the indictment, has no merit. The facts do not lend themselves to this defense under either statute. Section 4304 of the Penal Code,[16] abolished by Section 4701(b) of the Crimes Code, 18 Pa.C.S. § 4701(b), provided that the act for which the bribe is given must be one which the offeree had power to perform or influence. Although Superior Court's analysis of this issue is not totally clear, the offeree's lack of official power to accomplish the desired result is a variant of the impossibility defense. Neither this variant, nor the kind of impossibility which arises when the act the offeror assumes is prohibited is not illegal, has any application here. Hilton had power to award the insurance contract. His award of it in

16. 18 P.S. § 4304 provided, in relevant part:

§ 4304. Corrupt solicitation

Whoever, directly or indirectly, by offer or promise of money, office, appointment, employment, testimonial or other thing of value, or by threats or intimidation, endeavors to influence any member of the General Assembly, State, county, election, municipal or other public officer, in the discharge, performance, or nonperformance of any act, duty or obligation pertaining to such office, is guilty of corrupt solicitation, a misdemeanor,....

consideration of private gain was plainly illegal. Factual impossibility is not an available defense under the Crimes Code or the Penal Code. This exhausts the available affirmative defenses. Thus, no impossibility defense could have succeeded; and, indeed, it is hard to see how its assertion would reasonably have advanced appellee Ohle's interest.

[16] There is no evidence that appellee attempted to use the defense, or that he would have been precluded from invoking it had he attempted it.[17] We will not therefore approve quashing these indictments merely because an inapplicable defense is arguably precluded by that indictment.

Moreover, although the indictment was technically defective, Superior Court acted incorrectly in freezing it into its original language, without allowing any variance, despite the provisions of Pa.R.Crim.P. 213,[18] particularly since appellees were charged alternatively under both the Crimes Code and the Penal Code in the initial criminal complaint. Moreover, the trial court required the jury to find all the elements set forth in the Penal Code. Thus appellees were fully apprised of the potential application of the Penal Code to the bribery and conspiracy charges. They were on notice of any issues arising under it and should have been prepar-

17. Appellees' motion to quash these indictments makes no reference to any "affirmative defense" available under the Penal Code, although it plainly states the indictment should have been framed under it.

18. Pa.R.Crim.P. 213 provides in relevant part:

(a) An indictment ... shall be valid and sufficient in law if it contains:

....

(5) *a plain and concise statement of the essential elements of the offense substantially the same as or cognate to the offense alleged in the complaint;*

....

(b) The indictment shall contain the official or customary citation of the statute and section thereof or other provision of law which the defendant is alleged therein to have violated; but the omission of or error in such citation shall not affect the validity or sufficiency of the indictment.

....

Emphasis added.

ed to utilize any defense available. It is difficult to believe that experienced criminal defense counsel would have overlooked the defense of impossibility as it had traditionally existed in this Commonwealth, despite the differences in this respect between the Penal Code and the Crimes Code, especially considering the extensive commentary on that subject in the literature if it had had any application to these facts. Indeed, the extent to which impossibility is available as a defense under the Crimes Code is not yet settled. *See Commonwealth v. Henley, supra.* The more likely explanation is counsel's recognition that an impossibility defense was unavailable on these facts, a recognition this Court shares, as discussed above.

The absence of a citation to the Penal Code in the indictment is not a fatal variance under Pa.R.Crim.P. 213(b). The criminal complaint cited both the Crimes Code and the Penal Code. Moreover, the Commonwealth did provide appellee with "a plain and concise statement of the essential elements of the offense substantially the same as or cognate to the offense alleged in the complaint," as required by Pa.R.Crim.P. 213(a), albeit in the language of the Crimes Code. Whatever the technical differences, the offenses of bribery and conspiracy under the Penal Code are "similar" or "cognate" to those offenses under the Crimes Code. Thus, appellees had notice of the charges sufficient to permit preparation of a defense, the purpose of Rule 213.

[17, 18] Our position in this respect is consistent not only with our rule of criminal procedure, but also with the standards set by our case law for determining an indictment's sufficiency. "Indictments must be read in a common sense manner and are not to be construed in an overly technical sense." *Commonwealth v. Pope*, 455 Pa. 384, 390, 317 A.2d 887, 890 (1974). *See also United States v. Schoenhut*, 576 F.2d 1010 (3d Cir.1978), *cert. denied*, 439 U.S. 964, 99 S.Ct. 450, 58 L.Ed.2d 421. The purpose of the indictment is "to provide the accused with sufficient notice to prepare a defense, and to insure that he will not be tried twice for the same act." *Commonwealth v. Rolinski*, 267

Pa.Superior Ct. 199, 202, 406 A.2d 763, 764 (1979). *See also Commonwealth v. Ackerman*, 239 Pa.Superior Ct. 187, 361 A.2d 746 (1976). Furthermore, a variance is not fatal unless it "could mislead the defendant at trial, involves an element of surprise prejudicial to the defendant's efforts to prepare his defense, precludes the defendant from anticipating the prosecution's proof or impairs a substantial right." *Commonwealth v. Pope*, 455 Pa. at 391, 317 A.2d at 890 (footnotes omitted).

Under the facts of this case, the bribery and conspiracy indictments meet these standards. The variances were not "fatal." Appellees knew, or should have known, what crimes they were charged with and what the Commonwealth would be required to prove. They should not have been surprised or prejudiced. Indeed, the trial court's instruction to the jury that appellee Ohle would have to be found guilty under both the Penal Code and Crimes Code provisions arguably gave him more than he was entitled to. On this point the trial court charged:

> However, the Commonwealth claims that even though this indictment has been written to conform with the statute which came into effect in June of 1973, nevertheless, these acts which occurred were violations of the law whether it be under the Act which took effect in 1973 or under the prior penal code. So, I'm going to read both of these statutes to you, because in order to find Mr. Ohle guilty of the crime you must find that he violated the law as to bribery not only in connection with the one act—the one that is the basis for the indictment, but also that he violated the law as it existed prior to June 6, 1973. So, I'm going to read both of these Acts to you because they are both for your consideration and it is necessary for you, when you apply the facts to the law, to be able to determine that Mr. Ohle has either violated both Acts or has not.
>
> If he has not, then of course he would be innocent of the charge of bribery.

T.T. at 232 (December 13, 1978). We believe this instruction cured any lingering effect which may have resulted from the variance between the complaint and the indictment.

V

For these reasons we vacate the orders of Superior Court which granted appellees Ohle and Jackson a new trial on the charges of theft by failure to make required disposition of funds, as well as the order which reversed appellee Ohle's conviction for bribery and conspiracy and quashed the indictment against him on those charges. However, because its disposition did not require Superior Court to consider other trial errors appellees asserted, we remand the records to it for further consideration of those other issues.[19]

ROBERTS, C.J., and McDERMOTT, J., concur in the result.

NIX, J., did not participate in the consideration or decision of this case.

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470 A.2d 74

COMMONWEALTH of Pennsylvania, Appellant,

v.

John DUNBAR, Appellee.

Supreme Court of Pennsylvania.

Submitted Oct. 21, 1983.

Decided Dec. 19, 1983.

Defendant, whose convictions for manufacturing, delivering, or possessing a controlled substance with intent to

19. *See supra,* note 3.